No. 182

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

RUTH ELAINE ALLENDORF, as Special Administratrix of the Estate of James Dale Allendorf, Deceased,
Respondent,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Petitioner.

Petition for Writ of Certiorari

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Petition for Writ of Certiorari

Your petitioner brings this petition for a writ of certiorari to review a final decision of the Supreme Court of Illinois, on rehearing, which decided two important questions in the administration of the Federal Employer's Liability Act, namely: (1) whether the Supremacy Clause of the federal constitution compels a state court to assume jurisdiction of an FELA death case which arose outside the state, despite a non-discriminatory statute of the state denying such jurisdiction, and (2) the competency and scope of actuarial testimony as to the present value of future pecuniary losses of the decedent's dependents.

OPINION BELOW

The final opinion of the Supreme Court of Illinois on rehearing is reported as *Allendorf* v. *Elgin, J. & E. Ry. Co.*, 8 Ill. 2d 164, 133 N.E. 2d 288. The opinion handed down at the May, 1955 Term, which was superseded by the opinion on rehearing under the state practice, is not reported either officially or unofficially. Both opinions, including the dissenting opinion on rehearing, are printed as an appendix to this petition.

JURISDICTION.

The first opinion was filed and a judgment of affirmance was entered on May 20, 1955. Appellant's petition for rehearing was allowed on November 21, 1955. The final opinion on rehearing was filed and the final judgment of affirmance was entered on March 22, 1956. No further rehearing was permissible under the state practice and none was sought.

This petition is filed within ninety days from the final judgment of the Supreme Court of Illinois. Jurisdiction of this Court to review the judgment is invoked under Title 28, United States Code, §§ 1257 (3) and 2101 (c).

QUESTIONS FOR REVIEW.

1. Is a state statute, not discriminatory in its terms, denying state courts of jurisdiction to hear actions for wrongful death occurring outside the state invalid under the Supremacy Clause of the federal constitution when applied to actions under the Federal Employer's Liability Act? Subsidiary to the major question are the following:

   a. Did Congress either in the Federal Employer's Liability Act or otherwise, impose on state courts the requirement that they must hear cases brought under that statute?

b. Have either Congress or this Court declared a federal policy that a state must provide a remedy in its court for federally-created rights of action?

c. Absent Congressional action or a federally-declared policy, may a state legislature determine the jurisdiction of the courts of that state in accordance with local policy, and may the state courts enforce that policy as to FELA actions, even though prevented by the Full Faith and Credit Clause from enforcing the policy as to actions based on statutes of other states?

2. Must the calculations of an actuarial witness as to the present value of future contributions to his dependents, as a matter of law, be based upon (1) gross earnings, rather than take-home pay, (2) life expectancy rather than work expectancy, (3) the deductions only of his "personal expenses" of a nominal monthly amount, and (4) assumed contributions to his children after they attain their majority?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action is brought under the Federal Employer's Liability Act, Title 45, United States Code § 51-60 which so far as pertinent here provides:

> "§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia and any of the States or Territories,

and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

The Illinois statute involved is the proviso to § 2 of the Illinois Injuries Act, Ill. Rev. Stat. ch. 70, § 2, adopted May 13, 1903 (Laws, 1903, p. 217, § 1), which so far as relevant here is as follows:

" . . . Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

The constitutional provisions involved are:

Art. VI; Cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Full Faith and Credit Clause (Art. IV, Cl. 1) which was involved in *Hughes* v. *Fetter*, 341 U.S. 609, and *First Nat'l. Bank* v. *United Airlines, Inc.*, 342 U.S. 396, is not involved here.

STATEMENT OF THE CASE.

James Allendorf, a twenty-four year old switchman, who had been employed by the defendant since May, 1951, was instantly killed at Gary, Indiana on March 3, 1952 when he was struck by a cut of cars being kicked down a lead track adjacent to the track on which his crew was working. We do not raise here the questions as negligence, violation of the regulations and statutes governing locomotive headlights or contributory negligence which were argued below; hence the details of the accident are not material. The jury found adversely to the defendant on all such issues.

Allendorf was a resident of Indiana. He left surviving him his widow and twin daughters a year old; a third child was born post-humously five months later. His widow was appointed special administratrix by the Circuit Court of Lake County, Indiana (Abst. 93, 96) and she brought this action in the Circuit Court of Cook County, Illinois. Following the verdict and judgment for the plaintiff, defendant filed a motion in arrest of judgment, raising the issue of lack of jurisdiction under the proviso to the Illinois wrongful death statute. (Abst. 17) This motion was a timely method of raising the issue under the state practice. *Walton* v. *Pryor*, 276 Ill. 563. Plaintiff asserted the unconstitutionality of the statute. (Abst. 227-233) The trial court denied the motion, holding the Illinois statute unconstitutional under the federal constitution. (Abst. 233) The Supreme Court of Illinois, on direct appeal because of the constitutional question, affirmed, saying:

> "We hold, therefore, that insofar as section 2 of the Injuries Act prevents the bringing of actions within this State to recover damages for wrongful acts resulting in death committed without the State, it is contrary to article VI of the United States constitution."

The second question presented arises upon the rulings of the trial court permitting an actuarial witness to testify that the present cash value, discounted at 2-½% and 3% of monthly contributions of $378.09 for 464 months was, respectively, $112,904.37 and $104,418.69 (Abst. 106-108) The figure of $378.09 per month was based upon Allendorf's gross earnings for 1951, the year preceding his death, less only (1) the amount of his 1951 federal income taxes and (2) $50 per month, which amount his widow testified he used "for his personal purposes." (Abst. 94) and the figure of 464 months was an assumed "work expectancy" to age 65. (Abst. 108) The witness also testified to similar calculations based on a projection of Allendorf's 1952 earnings, the figures being $115,006.64 and $106,362.89. (Abst. 109) The admissibility and competency of this evidence was challenged by motion for new trial (Abst. 21) which the trial court denied. (Abst. 233) In its first opinion the Supreme Court of Illinois sustained the competency of this evidence generally; in the final opinion on rehearing, that court held that it was error to permit the actuarial witness to use figures of wages and years of expectancy shown in the evidence, but that the error was not prejudicial because as a matter of law the right of recovery should be based on gross earnings (without regard to federal income tax withholdings) less only the decedent's "personal expenses" and that such earnings should be projected for his life expectancy rather than his work expectancy and after his dependent children attained their majority.

Reasons Relied on for Allowance of the Writ.

1. The Supreme Court of Illinois, in holding that the Supremacy Clause invalidates state legislation limiting the jurisdiction of state court when applied to FELA legislation, has decided a federal question of substance in a way probably not in accord with

a. The history, language and construction of the Supremacy Clause;

b. The decision of this Court in *Missouri ex rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1;

c. The intent of Congress as evidence by the provisions of the Federal Employer's Liability Act and §1404(a) of the Judicial Code, and as construed by this Court in *Douglas* v. *New York N. H. & H. R. Co.,* 279 U.S. 377; *Missouri ex rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1; and *Ex parte Collett,* 337 U.S. 55.

2. The Supreme Court of Illinois, in holding that there was no reversible error in the actuary's calculations of the present value of future contributions has decided a federal question of substance in a way in conflict with applicable decisions of this Court and of the Courts of Appeal for the Sixth, Seventh and Eighth Circuits in holding that as a matter of law, such calculations must be based on:

a. Gross earnings, less only decedent's "personal expenses" in conflict with *Kansas City So. Ry. Co.* v. *Leslie,* 238 U.S. 599;

b. Gross earnings before federal income tax withholding rather than "take-home pay" in conflict with *Wetherbee* v. *Elgin, J. & E. Ry. Co.* (C.A. 7), 191 F. 2d 302.

c. Decedent's life expectancy rather than work expectancy, in conflict with *Wetherbee* v. *Elgin, J. & E. Ry. Co.* (C.A. 7), 191 F. 2d 302;

d. Contributions to his minor dependents during his entire lifetime rather than during their minority, in conflict with *Norfolk & W. R. Co.* v. *Holbrook,* 235 U.S. 625 and *Thompson* v. *Camp* (C.C.A. 6), 163 F. 2d 396 and *Chicago B. & Q. R. Co.* v. *Kelley,* (C.C.A. 8), 74 F. 2d 80.

ARGUMENT.

I.

THE SUPREMACY CLAUSE OF THE FEDERAL CONSTITUTION DOES NOT INVALIDATE THE ILLINOIS STATUTE LIMITING THE JURISDICTION OF ITS COURTS.

Since 1903, the Illinois wrongful death statute (inappropriately called the "Injuries Act") has provided:

> "No action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action exists under the laws of the place where such death occurred and service of process may be had upon the defendant in such place."

From the first, the Illinois courts applied the statute impartially, without discrimination as to the citizenship of the parties or as to the source of the right of action in a federal or state statute. In *Walton* v. *Pryor,* 276 Ill. 563, the Illinois court held the statute barred all action by an Illinois administratrix under the Federal Employer's Liability Act for the death of her husband at St. Louis, Missouri. The Waltons were residents and citizens of Illinois. In *Wall* v. *Chesapeake & O. Ry. Co.,* 290 Ill. 227 and *Dougherty* v. *America McKenna Co.,* 255 Ill. 369, the statute was applied to Illinois citizens suing under the wrongful death statutes of other states.

Following these decisions, Illinois courts have declined jurisdiction of out-of-state death actions. In *Stephenson* v. *Grand Trunk W. Ry. Co.* (C.C.A. 7), 110 F. 2d 401, the Court of Appeals held the statute did not restrict the jurisdiction of federal courts sitting in Illinois. This

Court granted certiorari limited to this issue, 310 U.S. 623, but the case was settled before hearing and dismissed pursuant to stipulation. 311 N.E. 720. See also *Davidson* v. *Gardner* (C.A. 7), 172 F. 2d 188. Subsequently, in *Hughes* v. *Fetter,* 341 U.S. 609, this Court, four justices dissenting, held unconstitutional as in conflict with the full-faith-and-credit clause (Article IV, Section 1) a Wisconsin statute generally like the Illinois statute and in *First National Bank of Chicago* v. *United Airlines, Inc.,* 342 U.S. 396 in an action brought in the Federal District Court in Chicago under the Utah wrongful death statute for the death of an airline passenger in a crash in Utah, this Court held that as applied to those facts, the Illinois statute also violated the full-faith-and-credit clause. Two justices dissented and two concurred specially, confining their concurrence to cases in the Federal District Courts.

The majority of the court below held that this "interplay of judicial decisions" limits the effective application of the Illinois statute only to "cases arising under the laws of the United States" and hence, under *McKnett* v. *St. Louis & S. F. Ry. Co.,* 292 U.S. 230 the Supremacy Clause of the Federal constitution overrides the legislative determination of the policy of the state to close its courts to out-of-state FELA death actions. Mr. Justice Klingbiel, dissenting, pointed out that there was neither a voluntary discrimination by Illinois against out-of-state FELA litigation nor any congressionable declaration of policy to the contrary.

We submit that the majority opinion below is squarely in conflict with this Court's decision in *Missouri ex. rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1. In that case it appeared that the Supreme Court of Missouri had construed *Baltimore & O. R. Co.* v. *Kepner,* 314 U.S. 44 and

Miles v. *Illinois Central R. Co.*, 315 U.S. 698 as compelling a state to reject the doctrine of *forum non conveniens* in FELA actions. 359 Mo. 827, 224 S.W. 2d 105. Deeming the question "important to the enforcement of the Federal Employer's Liability Act by the courts of the States" this Court granted certiorari, 339 U.S. 918, and upon review held that neither the *Kepner* nor the *Miles* cases

> "limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employer's Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially."

Turning to the legislative history, this Court pointed out:

> "There was nothing in that Act even prior to §1404 (a) of the 1948 revision of the Judicial Code, Title 28, U.S.C., which purported 'to force a duty' upon the State courts to entertain or retain Federal Employers Liability litigation 'against an otherwise valid excuse.' *Douglas* v. *New Haven R. Co., supra,* [279 N.S. 377] at 388."

Following the *Mayfield* case, state courts across the nation, with a growing awareness of the evils which follow the transportation and concentration of these cases in a few states, have held that under the doctrine of *forum non conveniens* the courts of those states are not required to entertain out-of-state FELA litigation. See *Price* v. *Atchison, T. & S. F. Ry. Co.*, 42 Cal. 2d 577, 268 P. 2d 457, overruling *Leet* v. *Union Pacific R. Co.*, 25 Cal. 2d 605, 155 P. 2d 42 and *Schultz* v. *Union Pacific R. Co.*, 118 Cal. App. 169, 257 P. 2d 1003; *Johnson* v. *Chicago, B. & Q. R. Co.*, 243 Minn., 58, 66 N.W. 2d 763, overruling earlier Minnesota decisions; *St. Louis-San Francisco Ry. Co.* v. *Superior Court* (Okla.) 276 P. 2d 773, followed in a subsequent case of the same name reported in 290 P. 2d 118; *Smith* v. *Atlantic Coast Line R. Co.*, 218 S.C. 481, 62 S.E.

2d 311. In *Atlantic Coast Line. R Co.* v. *Pope*, 92 S. E. 2d 300, the Georgia Court said:

> "The reversal by the Supreme Court of the United States of the *Pope case,* [345 U.S. 379] *supra,* is not construed here to constitute any restriction on the part of a sovereign state to determine its own policy. This court recognizes, as the Supreme Court of the United States must, that while Congress may pass an act establishing rights of action and conferring on State courts jurisdiction to hear and determine resultant litigation, Congress has no power to require State courts to accept jurisdiction of such causes of action."

If, as these decisions point out, and as this Court held in the *Mayfield* case, state courts are free "to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law," so the legislatures of the several states are free to adopt a statutory declaration of a limited *forum non conveniens* principle as a matter of local policy. This Court pointed out in *Building Service Union* v. *Gazzam,* 339 U.S. 532 at 537:

> "The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. 'Primarily it is for the lawmakers to determine the public policy of the State.' *Twin City Pipe Line Company* v. *Harding Glass Company,* 283 U.S. 353, 357."

So, too, in Illinois, the public policy of the state is determined primarily by the legislature. *People ex rel. Healy* v. *Shedd,* 241 Ill. 155, 163; *Harding* v. *American Glucose Co.,* 182 Ill. 551, 616; *Illinois Bankers' Life Ass'n.* v. *Collins,* 341 Ill. 548, 551. The Supremacy Clause is binding upon "the judges in every state" as well as on state legislatures, and if a state in the exercise of its judicial power through its courts formulates a policy of excluding out-of-state litigation, whether FELA or otherwise, so

in the exercise of its legislative function in determining the jurisdiction of its courts, the state may accomplish the same result.

True the Illinois statute here involved is not a codification of the *forum non conveniens* principle. Neither is § 1404(a) of the Judicial Code, as this Court pointed out in *Norwood* v. *Kirkpatrick,* 349 U.S. 29, yet that statute declares the congressional policy as to FELA actions. *Ex parte Collett,* 337 U.S. 55. For the several discretionary standards of the *forum non conveniens* rule, the Illinois legislature substituted a single standard, the boundaries of the state, and it made that standard applicable, so far as it was able, to citizens and non-citizens, and to state, federal and foreign causes of action; dismissal, not transfer, resulted from lack of jurisdiction, not from lack of venue, but this choice was a proper legislative function.

We submit that nothing in the history, the language or the construction of the Supremacy Clause denies the right of Illinois thus to fix the jurisdiction of its courts where, as here, neither the Equal Privileges or Full Faith and Credit Clauses are involved. Historically the Constitutional Convention adopted the Supremacy Clause from the New Jersey Plan after decisively rejecting, both in committee of the whole and in convention, the provision of the Virginia Plan which would have empowered the national legislature "to negative all laws passed by the several States". Farrand, Records of the Federal Convention of 1787, Vol. I, p. 163; Vol. II, p. 28, p. 382. Bancroft says in his History of the Formation of the Constitution, Vol. II, pp. 90-91:

> "From the New Jersey plan it was taken without one dissentient, that the laws and treaties of the United States should be the supreme law of the states, and bind their judiciaries, anything in their laws to the contrary notwithstanding. *That all power not*

granted to the general government remained with the states was the opinion of every member of the convention; but they held it a work of supererogation to place in the constitution an express recognition of the reservation.'' (Emphasis added)

Curtis summarizes the post-convention development in his Constitutional History of the United States, Vol. II, p. 163:

"That the people of the several states would retain all the original and inherent powers not parted with by cession to the Federal Government was assumed to be a fundamental implication, resulting from the fact that the powers granted to the Federal Government were specific, described, limited, and enumerated, and did not comprehend all the powers of sovereignty. But when the Constitution, as originally framed and promulgated, came before the people of the several states for adoption and ratification, they were not content to leave this very important matter to implication; they demanded an express reservation of all the powers which were not to be ceded by the people of the several states to the Federal Governmenet, or which they were not to be prohibited from exercising. Accordingly the Tenth Amendment, adopted in 1789-91, was made to declare:

" 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

"By this reservation every state remains a self-governing political community, in respect to its own inhabitants, in every relation in which those inhabitants are not by the Constitution of the United States placed under the authority of the Federal Government.

"It is this mass of rights, privileges, and powers not vested in the Federal Government, but retained by the people of each state, that constitutes the state sovereignty. It follows, as a necessary consequence from this system, that the people of every state in this Union have under their entire control every relation

> of their inhabitants that is not under the control of the United States by reason of some provision in the Federal Constitution. With the domestic relations of their inhabitants the states can deal as they see fit."

Thus the Tenth Amendment reserves to the several states the power to determine the jurisdiction of their courts.

Nothing in the language of the Supremacy Clause sustains the ruling of the Court below. The Supremacy Clause provides merely that "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Here "the law . . . made in pursuance" of the Constitution is the Federal Employer's Liability Act. But as this Court pointed out in the *Mayfield* case, while section 6 of the Act empowers the courts of the several states to entertain suits arising under it:

> "There was nothing in that Act even prior to § 1404(a) of the 1948 revision of the Judicial Code, Title 28, U.S.C., which purported 'to force a duty' upon the State courts to entertain or retain Federal Employers Liability litigation 'against an otherwise valid excuse'. *Douglas* v. *New Haven R. Co., supra,* at 388."

Even in *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U.S. 230, upon which the majority opinion below is based, the Court said:

> "Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employer's Liability Act."

In *United Automobile Workers* v. *Wisconsin Employment Relations Board,* decided June 14, 1956, this court said:

> "If the congressional enactment occupies the field, its control by the Supremacy Clause supersedes or, in the current phrase, pre-empts state power."

Here Congress has not occupied the field (compare *Pennsylvania* v. *Nelson*, 76 S. Ct. 477 and *Railway Employees' Dept.* v. *Hanson*, 76 S. Ct. 714); on the contrary, to the extent that congressional intent can be derived from "the plain meaning of the statutory words and the consistent course of the legislative history" of section 1404(a) of the Judicial Code, freeing federal district courts from the mandatory venue provisions of section 6 (see *Ex parte Collett*, 337 U.S. 55), it is that a court in which an FELA action *may* be brought is not *compelled* to entertain it. Mr. Justice Jackson, concurring in the *Mayfield* case, pointed this out:

> "Certainly a State is under no obligation to provide a court for two nonresident parties to litigate a foreign-born cause of action when the Federal Government, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case."

This Court's construction of the Supremacy Clause as affecting the jurisdiction of state courts over federally-created rights is set forth in the concurring opinion of Mr. Justice Frankfurter in *Brown* v. *Gerdes*, 321 U.S. 178, at 189:

> " * * * Whether a state court is 'competent to decide rights of the like character and class,' whether the particular litigation is to be tried by jury and, if so, how the jury is to be composed whether it is to be a jury of twelve or less, whether decision is to be by unanimity or majority, whether security is to be furnished and of what nature — in sum, whether a state court can take jurisdiction and what the incidents of the litigation should be — all these are matters wholly within the control of the State creating the court and without the power of Congress. See, for instance, *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U.S. 211. As it was put by Mr. Justice Story in *Martin* v. *Hunter's Lessee*, 1 Wheat.

304, 330-331, 'Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself.' Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them, subject to all the conditions for litigation in the state courts that the State has decreed for every other litigant who seeks access to its courts.

"4. Congress from the beginning has allowed federally created rights to be enforced in state courts not only by the general implications of our legal system but also by explicit authorization. The nature of the obligation of the state court under such legislation has been most litigated in connection with the Federal Employer's Liability Act, and after thorough canvass the matter was thus summarized by Mr. Justice Holmes in *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U.S. 377, 387-388, 'As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse.'

"5. The simple fact is that from 1789 to this day no act of Congress has attempted to force upon state courts the duty of enforcing any right created by federal law on terms other than those on which like litigation involving rights other than federal rights is required to be conducted in a state court. It certainly has not done so by the Bankruptcy Act nor can any implication to that effect be derived from the Supremacy Clause of the Constitution. For the Supremacy Clause does not give greater supremacy to the Bankruptcy Act over the free scope of the States to determine what shall be litigated in their

courts and under what conditions, than it gives with reference to rights directly secured by the Constitution, such as those guaranteed by the Full Faith and Credit Clause, see *Anglo-American Provision Co.* v. *Davis Provision Co., No.* 1, *supra,* or with reference to the power exercised by Congress under the Commerce Clause, see *Minneapolis & St. Louis R. Co.* v. *Bombolis, supra.*"

Mondou v. *New York, N. H. & H. R. Co.,* 223 U.S. 1, is an illustration of the principle that when Congress gave state courts concurrent jurisdiction of FELA actions, it took the state courts as it found them. In that case this Court held that an FELA action might be maintained "as of right, in the courts of the state where their jurisdiction, *as prescribed by local laws,* is adequate to the occasion." 223 U.S. 1, at 55 (emphasis supplied). In its first opinion the Illinois court relied heavily upon the *Mondou* case, but in the final opinion on rehearing, the premise that Illinois courts were experienced in the trial of wrongful death and FELA actions is abandoned *in toto;* instead the court recognized frankly that "if not in conflict with the United States constitution, it [the Illinois statute] bars the present action;" hence the trial court's jurisdiction, "as prescribed by local laws" was *not* adequate to the occasion. The sole ground of constitutional conflict was with Article VI, the Supremacy Clause. The Illinois court found such conflict as the result of the "interplay of judicial decisions" applying the Full Faith and Credit clause, because of which the statute "has been limited to apply only to suits arising under the laws of the United States or of a foreign country." But as Mr. Justice Klingbiel points out in his dissenting opinion, the State of Illinois has not discriminated against federal causes of action; the policy of Illinois is declared by its legislature and applied by its courts for 48 years "makes no distinction on the basis of

the law sought to be enforced. . . . The practical difference of treatment arose from the decision of the United States court in *Hughes* v. *Fetter* [341 U.S. 609], not from action or choice by this State." It is the interplay of different constitutional provisions which brings about the difference in result; that difference in result created by the constitution itself cannot be an unconstitutional discrimination.

We submit that the legislatively-declared policy of Illinois as limited by *Hughes* v. *Fetter* is entitled to the same recognition as the judicially declared policy of *forum non conveniens* in other states. The factors which impelled the Court to grant certiorari and to reverse the judgments below in the *Mayfield* case are equally impelling here.

II.

THE RULINGS OF THE TRIAL COURT AND THE DECISION OF THE SUPREME COURT AS TO THE COMPETENCY OF THE ACTUARIAL EVIDENCE ARE IN CONFLICT WITH CONTROLLING FEDERAL DECISIONS.

The second question presented by this case, of importance in the enforcement of the federal statute, is the admissibility and competency of actuarial calculations based upon the decedent's gross earnings for the full period of his life expectancy as shown by annuity tables. Upon these issues the final decision below is directly in conflict with this Court's decisions in *Kansas City So. Ry. Co.* v. *Leslie,* 238 U.S. 599, and *Norfolk & W. R. Co.* v. *Holbrook,* 235 U.S. 625, and the decisions of the Courts of Appeal for the Sixth, Seventh and Eighth Circuits in *Thompson* v. *Camp* (C.C.A. 6), 163 F. 2d 396; *Wetherbee* v. *Elgin, J. & E. Ry. Co.* (C.A. 7), 191 F. 2d 302; and *Chicago, B. & Q. R. Co.* v. *Kelley* (C.C.A. 8), 74 F. 2d 80.

Over the defendant's detailed and specific objections and motion to strike (which appear at pages 107-109 and 115-116 of the printed abstract of record below and are partially summarized in the final opinion below, set forth at App. p. 11) the trial court permitted an actuarial witness to testify that the present cash value, discounted at 2½% and 3% of monthly contributions of $378.09 for 464 months was, respectively, $112,904.37 and $104,418.69. (Abst. 106-108) The figure of $378.09 per month was based upon Allendorf's gross earnings for 1951, the year preceding his death, less only (1) the amount of his 1951 federal income taxes and (2) $50 per month, which amount his widow testified he used "for his personal purposes." (Abst. 94; opinion, App. p. 14) and the figure of 464 months was an assumed "work expectancy" to age 65. (Abst. 108) The witness also testified to similar calculations based on a projection of Allendorf's 1952 earnings, the figures being $115,006.64 and $106,362.89. (Abst. 109)

Upon rehearing the Supreme Court of Illinois held the actuarial evidence was improper, saying:

> "It is agreed that it was not within the province of the actuary to testify that the plaintiffs have been deprived of a monthly contribution of $378.09, nor was it within her province to say how long any contribution might continue. If the witness had been asked to quote the value of $1 per month payable at the end of each month for periods of ten, twenty, thirty, forty years, then the jury with the assistance of counsel could project that figure into the future, for however long a period the jury should determine. The salient vice of the challenged testimony is implicit in the likelihood that the jury interpreted the actuary's presentation as testimony that decedent would continue to work as a switchman for 38 years and 8 months and that his earnings would remain at $5500 per year and

that his dependents would receive from him $378.09 per month for that period."

* * * * * *

"To allow an actuary to testify to figures, which the jury might adopt as real, carries with it the danger that the jury will accept them not only as the actuary's explanation of his process of computation, but also as proof of contribution and life and work expectancy. Anticipating this very danger, the defendant caused the jury to be instructed that the actuary's testimony was not to be so interpreted and on cross-examination of Miss Young, it was thoroughly developed that she did not mean to be saying what amount in dollars the plaintiffs would have received had decedent lived, nor for what period of time they would have received the same."

and held that:

"We are of the opinion that the proper method of assisting a jury in making damage calculations is for the actuary to use neutral figures. In the usual situation where hypothetical inquiries are permissible, it is necessary that the expert assume a factual situation as reflected in the proof in order to insure that his testimony bears upon the issue to be determined. The actuary, however, is called upon only to describe to the jury a mathematical process that will simplify the jury's task of determining the present value of the contribution that plaintiffs would have received had decedent not been killed. To accomplish that purpose it is not necessary that he use figures that correspond with those appearing in evidence, and when he does so there is a danger that the jury may be misled. Once the formula is before the jury, its application to the facts of the case is a matter for argument of counsel."

But instead of reversing the judgment because "the jury was undoubtedly misled by the actuary's figures" as was done in the controlling decision, *Wetherbee* v. *Elgin, J. & E. Ry. Co.* (C.A. 7), 191 F. 2d 302 at 311, the court

below held that the error was "counterbalanced by the many other advantages" to the defendant in that the calculations were based on net earnings, after deduction of $50 per month for "personal expenses" and federal income tax withholdings and upon an assumed "normal age for railroad retirement" of 65. (Opinion, App. p. 17) Thus the Illinois court squarely held that as a matter of law the pecuniary loss to a widow and minor dependents must be based on the decedent's gross earnings, less only his purely personal expenditures, extending over his entire life expectancy. We submit that each of the "counterbalancing advantages" thus found were erroneous as a matter of law.

Plaintiff's counsel conceded, in their briefs below, that it had been "settled law for 40 years" that "in a death case under the FELA the measure of damages is the pecuniary loss to the dependents," citing *Michigan Central R. Co.* v. *Vreeland,* 227 U.S. 59, and *Kansas City So. Ry. Co.* v. *Leslie,* 238 U.S. 599. But in holding that only the decedent's "personal expenses" need be deducted from his gross earnings, the Illinois court is directly in conflict with the admittedly "settled law" of the *Leslie* case, where this Court held that it was reversible error to instruct the jury that from their estimate of the decedent's future earnings "the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover" 238 U.S. at 604. The error is not rendered harmless by the court's observation that "if $50 did not correctly reflect the amount of decedent's personal expenses, it was defendant's privilege to adduce proof to the contrary." (Opinion, App. p. 14); under the *Leslie* case, the measure of damages was *not* "gross-earnings-less-personal-expenses" and the burden was on the plaintiff

to adduce competent evidence of pecuniary contributions, and not upon the defendant to prove her damages in this respect. Defendant's objection to the testimony as to "personal expenses" (Abst. 93) was well taken; on cross examination it was shown without contradiction that a part of his wages went monthly into a credit union account, into the purchase of a house and a car, as well as insurance premiums, in addition to food, clothing and shelter for himself. (Abst. 94-95) More was not needed to show the fallacy of the use of the "personal expense" figure of $50 a month, and the trial judge had already ruled he would not permit more. (Abst. 94)

The approval by the Illinois court of the use of gross earnings, rather than "take home pay" *i.e.* after federal income tax deductions, as the base figure, and life expectancy rather than work expectancy as the period involved is also contrary to the carefully considered and frequently approved decision of the Court of Appeals for the Seventh Circuit in *Wetherbee* v. *Elgin, J. & E. Ry. Co.* (C.A. 7), 191 F. 2d 302. In that case the actuarial witness testified "as to the cash value at the time of trial of decedent's probable future gross earnings" without taking into consideration "the possibilities of Wetherbee's disability from illness or accident, or the matter of voluntary retirement" and his computations "were not based on the amount of decedent's take home pay." 191 F. 2d 310. The actuarial witness here made the same admissions upon cross examination by counsel who had tried the *Wetherbee* case. (Abst. 110-112) The Court of Appeals summarized the objections made in the *Wetherbee* case: that the testimony was "based upon two false and incompetent premises: (1) that decedent's probable future earnings may be calculated on the basis of life expectancy instead of the length of time he may expect

to be employed; (2) that his dependents' loss of future benefits may be calculated on decedent's probable future gross earnings rather than on his probable contributions for their support." 191 F. 2d 310-311. The court below summarized our objections here (Opinion, App. p. 11):

> "It is contended here that since the jury's verdict so closely approximated the projected result reached by the actuary, that the jury of necessity relied upon the two factors, namely, $378 per month and 38 years and 8 months, as established by the evidence; that by so doing the jury failed to take into consideration many uncertainties in life, namely, that decedent might not have lived 38 years, nor continued to be employed for that period, nor received the same pay throughout, that payments to his dependents would not remain the same after his children became of age, that his personal expenses might exceed $50 per month, etc."

In the *Wetherbee* case the Court of Appeals sustained both of defendant's contentions; here the Illinois Supreme Court holds that gross earnings irrespective of tax withholdings and life expectancy rather than work expectancy are the proper bases of calculation by the jury.

The conflict between the decisions which, on the one hand, must be followed in federal courts sitting in Chicago and those which govern state courts in Illinois is clear and direct. The *Wetherbee* decision is not to be explained by the specious argument that the only question decided was that the jury had failed to diminish damages in proportion to the decedent's negligence and "for that reason alone reversed." The records of this Court demonstrate that counsel in that case, who could best appreciate the issues decided there, made no mention of such a basis for decision in their briefs either on certiorari or rehearing. Common sense supports the rule in the *Wetherbee* case. Federal income tax withholdings—money earned but never

received by a wage earner—is no part of the pecuniary contributions to his dependents; it is his pecuniary contribution to his government. It is the use of gross earnings, a large part of which a man never sees and never spends, and the attempted projection of those earnings for thirty or forty years into the future, and not "the incident of taxation" which "introduces an extraneous subject, giving rise to conjecture and speculation." Present day wage rates, fixed by nation-wide collective bargaining, naturally include present federal income taxes; taxes are as much a part of wage increases as are cost-of-living indexes.

The fallacy of projecting gross earnings over the employee's entire life expectancy rather than his work expectancy is exposed by the *Wetherbee* decision. Again common sense compels the conclusion that a workman cannot continue to make "pecuniary contributions" to his dependents when he is no longer working. Juries may be kept uninformed of Railroad Retirement Act benefits (see *Chicago & N. W. Ry. Co.* v. *Curl* (C.A. 8), 178 F. 2d 497, 502) but courts cannot fail to take judicial notice of the beneficial retirement provisions of that statute and the common knowledge that the vast majority of railroad men reaching retirement age avail themselves of those benefits.

A second fallacy in the assumption that Allendorf's contributions to his dependents would continue in the same proportion of his income for his entire life expectancy is that this assumes he would continue to support his children during his entire expectancy of 67 or 68 years (Abst. 97), when the children would be in their early forties. (Abst. 92) This assumption and the conclusion of the Illinois court based upon it is contrary to the long-settled

rule first announced by this Court in *Norfolk & W. R. Co.* v. *Holbrook,* 235 U.S. 625, and followed in *Thompson* v. *Camp* (C.C.A. 6), 163 F. 2d 396, and *Chicago, B. & Q. R. Co.* v. *Kelley* (C.C.A. 8), 74 F. 2d 80, that the recoverable damages of minor dependents are limited to the period of their minority. Again we all know as a matter of common experience that adult children, unless they are mentally or physically defective, are not supported by their parents, and an actuarial witness should not be permitted to mislead the jury by calculations based on assumptions which are contrary to fact.

We submit that none of the factors which the court below thought "counterbalanced" what the court found was "the salient vice" of the actuary's use of assumed actual figures of earnings and expectancy is sound as a matter of law. That evidence put before the jury what appeared to be the testimony of an expert that Allendorf's dependents had sustained a pecuniary loss well over $100,000. The error in permitting the jury to be thus misled was not cured by any of the factors relied upon by the court below. The conflict between long-settled decisions of this and other federal courts and the attempted justification for failure to reverse for admitted error set forth in the opinion below upon the proper elements of recoverable damage in an FELA death case presents an important question in the administration of the act which should be clarified by this Court.

CONCLUSION.

We respectfully submit that the considerations which led this Court to grant certiorari in the *Mayfield* case are equally present here. If, despite the fact that Congress has never attempted to compel state courts to hear all FELA cases, no matter where the cause of action arose

and irrespective of the considerations which by §1404(a) of the Judicial Code Congress made applicable to FELA actions in federal courts and despite the further fact that this Court directly held in the *Mayfield* case that state courts might as a matter of local policy apply the doctrine of *forum non conveniens* to FELA actions, a state is without the right to determine the jurisdiction of its courts by a non-discriminatory statute when applied to out-of-state FELA causes of action, there has been a serious invasion of the rights reserved to the states under the Tenth Amendment. The construction which the Illinois court places on the Supremacy Clause would equally forbid state courts from applying the doctrine of *forum non conveniens* to FELA cases; as a practical matter, those cases are virtually the only ones in which that doctrine is invoked. The right of a state to free its courts of the burden of litigation with which it has no concern whatever is of vital importance in the administration of this statute, and that right, repeatedly declared by this Court and never attempted to be impaired by Congress, is the basic issue here.

From a practical standpoint, the proper limits on actuarial calculations of recoverable damages in an FELA death case is an important factor in the administration of the statute. The conflict between this and other recent decisions of the Illinois court and the decisions of federal courts is increasing rather than lessening; that conflict can only be resolved by this Court.

For these reasons, your petitioner respectfully prays for the issuance of the writ of certiorari to review and resolve the serious conflicts presented by the decision below.

Respectfully submitted,

HARLAN L. HACKBERT
Attorney for petitioner.

APPENDIX.

Opinions and Judgment of Supreme Court of Illinois. Final Opinion on Rehearing.

Docket No. 33394—Agenda 42—November, 1955.
Ruth Elaine Allendorf, Admrx. Appellee, v. Elgin, Joliet and Eastern Railway Company, Appellant.

Mr. Justice Bristow delivered the opinion of the court:

James Allendorf, an Indiana resident, was killed on March 3, 1952, while performing his duties as switch foreman in the defendant's railroad yards at Gary, Indiana. Thereafter, his wife, Ruth Allendorf, filed this action in the circuit court of Cook County, as special administratix, to recover damages under the provisions of the Federal Employers' Liability Act. (45 U.S.C.A. sec. 51-59.) Trial was had by a jury, which, in addition to returning special findings as to negligence which were favorable to the plaintiff, also rendered a verdict for her in the amount of $127,500. After judgment was entered thereon, the defendant filed motions in arrest of judgment, for judgment notwithstanding the verdict, and for a new trial. As a basis for the former, it was contended that section 2 of the Injuries Act (Ill. Rev. Stat. 1951, chap. 70, par. 2,) precludes Illinois courts from assuming jurisdiction of a wrongful death action arising in a sister State. In opposition thereto, plaintiff argued that the statute, insofar as it so provided, was in conflict with the supremacy clause of article VI of the United States constitution, and was therefore unconstitutional. The defendant's motions were subsequently denied and direct appeal has been taken to this court. In addition to the constitutional issue presented, the defendant contends that the verdict was not

properly supported by the evidence and that the trial court erred in allowing certain actuarial testimony.

We must first decide whether the courts of Illinois have the power to entertain a cause of action for a wrongful death occurring outside of this State. Section 2 of our Injuries Act, after placing certain limitations upon the right of recovery, continues: "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

This proviso prohibits actions where the wrongful act occurred outside this State. (*Crane* v. *Chicago and Western Indiana Railroad Co.*, 233 Ill. 259.) Thus, if not in conflict with the United States constitution, it bars the present action.

In *Huges* v. *Fetter*, 341 U.S. 609, 95 L. ed. 1212, an action had been brought in Wisconsin to recover for a wrongful death occurring in Illinois but had been dismissed because the laws of Wisconsin refused to recognize such out-of-State actions. The Supreme Court of the United States, in holding that Wisconsin must give full faith and credit to the Illinois statute, said: "That State [Wisconsin] has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, the exclusionary rule extending only so far as to bar actions for death not caused locally." The court reiterated this principle by holding that a Federal court, sitting in Illinois, could not refuse to entertain an action based upon the wrongful death statute of Utah. (*First National Bank of Chicago* v. *United Air Lines*,

342 U.S. 396, 96 L. ed. 441.) In its opinion, the court said that Illinois had not met constitutional requirements in permitting such actions to be brought only if the defendant could not be served in the State where the cause arose.

It is clear that a State can no longer refuse to entertain wrongful death actions which originate under the laws of a sister State, if, like Illinois, it entertains such actions when they arise under its own laws. Section 2 of our Injuries Act has thus been limited to apply only to suits arising under the laws of the United States or of a foreign country. As a practical matter, this means that it applies only to cases arising under the laws of the United States. But it has also been held that a State cannot discriminate against rights which arise under Federal law, as does the right in this case. (*McKnett* v. *St. Louis and San Francisco Railway Co.* 292 U.S. 230, 78 L. ed. 1227.) In effect, therefore, we have here the problem that was presented in the *McKnett* case. There, by the language of the statute, cases arising under a Federal statute were excluded. Here, by the interplay of judicial decisions, instead of the direct language of the statute, the same discrimination results. "A statute valid when enacted, may become invalid by change in the conditions to which it is applied." *Nashville, Chattanooga & St. Louis Railway* v. *Walters,* 294 U.S. 405, 414. We hold, therefore, that insofar as section 2 of the Injuries Act prevents the bringing of actions within this State to recover damages for wrongful acts resulting in death committed without the State, it is contrary to article VI of the United States constitution.

The defendant next contends that the verdict was not properly supported by the evidence. In order to decide this question we must first look to the facts of the case. James Allendorf, the decedent, reported for work at 11:00 P.M. on the night of March 2, 1952, for a normal eight-

hour shift, and was assigned as foreman of a switching crew in the defendant's general classification yard at Gary, Indiana. In addition to the foreman, the crew consisted of an engineer and fireman, who were stationed in the engine, a field man and a head man. It was the crew's duty to arrange the railroad cars in proper order for their delivery to neighboring industries. To do this it was necessary to go into various tracks located in an area known as the "F" Yard and pull out cars and place them on other tracks. Prior to the accident, the Allendorf crew was working on the track known as the "F" Yard lead, which ran approximately in an east and west direction. Immediately to the north was the "L" Yard lead which ran parallel to and was approximately twelve feet from the "F" Yard lead. Between these tracks were various switch stands, which controlled the movements into the various tracks, and at the far westerly end was located a floodlight tower. Allendorf's engine was at all times during the course of the evening headed in a westerly direction. Since it was necessary for him to pass signals to his engineer, Allendorf normally stood between the "F" and "L" Yard leads. During the same night, a crew, under the supervision of Francis Fay, was assigned similar duties in the "N" Yard. However, at approximately 2:30 A.M., the Fay crew was sent over to the "L" Yard to remove defective cars from a train that had already been made up. Their job was to "kick" the defective cars down the "L" Yard lead into a different track. Since their engine was also headed in a westerly direction, the Fay crew worked on the north side of the "L" Yard lead. Thus, only the Allendorf crew was located between the "F" and "L" Yard leads. The engines used by both crews were diesel operated, were equipped with both headlights and back-up lights, and could travel with equal ease in either direction. The head man on Allendorf's crew testified that immedi-

ately before the accident a mistake had been made by him and certain cars were placed on the wrong track. He and Allendorf had discussed the matter at approximately 3:00 A.M. while standing in the center between the two lead tracks "L" and "F", and as he walked away he turned to see Allendorf's lantern go down. It was later shown that Allendorf had been struck by the defective cars being kicked down the "L" Yard lead. Others stated that after this conversation, they saw Allendorf's lantern move a step or two and then fall. The head man further testified that he immediately climbed upon the "F" lead cars and looked in a westerly direction, hoping to see the engine that had shoved the defective cars, but that he saw neither an engine nor its back-up light. Nussle, the engineer in Allendorf's crew, testified that although he was looking in a westerly direction before the accident, he did not know an engine was working on the "L" Yard lead nor did he see any back-up light. However, both the engineer and fireman of the Fay crew testified that the headlights and back-up lights of their engine were on at all times prior to the accident. There was much conflicting evidence as to whether Allendorf knew that another crew was working on the adjoining "L" Yard lead. Fay, the "L" Yard foreman, stated that he had told his field man to warn the Allendorf crew of the impending movement on the "L" Yard lead. The field man stated he had told a member of the Allendorf crew, but not Allendorf himself. The yardmaster swore that at about 2:30 A.M. he informed Allendorf that the Fay crew would be kicking cars down the "L" Yard lead. He further testified that later he warned the Allendorf crew by loudspeaker. This was not verified by any member of the crew. The evidence was also extremely conflicting as to the degree of lighting in the accident area. It did show, however, that although the

cars which struck Allendorf were neither lighted nor accompanied by any member of the switching crew, such was the usual custom in such operations. Other testimony showed that after allowing for the car overhang, the working distance between the "F" and "L" Yard leads was approximately six and one-half feet.

In order to recover under the Federal Employers' Liability Act it is necessary to prove that the defendant was negligent and that such negligence was the proximate cause of the accident, in whole or in part. (*Tennant* v. *Peoria and Pekin Union Railroad Co.*, 321 U.S. 29, 88 L. ed. 520.) The plaintiff contended and the jury specifically found that the defendant did not warn the decedent of the intended movement of cars on "L" Yard lead, that the rear light on the Fay engine was not lighted prior to and at the time of the accident, and that the decedent was not himself guilty of negligence. In her complaint the plaintiff had also alleged that the area was improperly lighted and that the defendant had failed to furnish a safe place to work.

Judges are not free to reweigh the evidence and set aside the jury verdict merely because they, as individuals, might have arrived at different conclusions. (*Tennant* v. *Peoria and Pekin Union Railroad Co.*, 321 U.S. 29, 88 L. ed. 520.) Only where there is a complete absence of probative facts to support the conclusion reached, does reversible error appear. (*Starck* v. *Chicago and North Western Railway Co.*, 4 Ill. 2d. 616; *Bonnier* v. *Chicago, Burlington & Quincy Railroad Co.*, 2 Ill. 2d 606; *Wetherbee* v. *Elgin, Joliet and Eastern Railroad Co.*, 191 Fed. 2d 302.) As the court said in *Lavender* v. *Kurn*, 327 U.S. 645, 90 L. ed. 916: "But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its con-

clusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." Although the evidence in this case is, upon some points, conflicting, we cannot say as a matter of law that the verdict was not properly supported by the evidence. After considering the record as a whole, we are of the opinion that there was sufficient evidence presented from which a jury could reasonably conclude that the defendant was guilty of the negligence charged and that such negligence was the proximate cause of the decedent's death.

Defendant further contends that the court erred in admitting in evidence the actuary's calculations of plaintiff's projected pecuniary loss, and that since the verdict of the jury closely approximated the sum suggested by the actuary, that testimony was misleading and warrants reversal of the cause.

Although actuarial calculations were presented in a death case under the Federal Employer's Liability Act in *Starck* v. *Chicago and North Western Railway Co.*, 4 Ill. 2d 611, the propriety of that evidence was contested only in a limited respect.

Elizabeth Young, the actuary, is an expert in actuarial work, having specialized in actuarial science at the University of Iowa where she received a degree in that branch of education, and, further, had twenty-four years experience as a consulting actuary. Let us examine her testimony rather fully. On direct examination it was assumed that decedent had a gross income in 1951 of $5542.70, and subtracting from that sum income tax deductions and $50 per month for his personal expenses would leave a net average monthly balance of $378.09. Then Miss Young testified

that she had determined the present cash value of future lost monthly contributions of $378.09 over a period of 38 years and 8 months, discounted at 2½ per cent and at 3 per cent, using the compound discount tables in making her calculations. It was assumed that the $378.09 was the amount that the dependents of the deceased would have received each month had he lived and continued to be employed with the same income.

Over objection Miss Young testified that the present value of such amount for such a period at 2½ per cent is $112,904.37 and for 3 per cent the value would be $104,418.69. She further testified that the present value of $1 per month payable at the end of each month for 38 years and 8 months, assuming an interest rate of 3 per cent, is $276.17416. If this sum is multiplied by $378.09, you will have again the sum of $112,904.37. Defendant argues that by the actuary predicating her ultimate results upon a specific sum of $378.09 and for the definite period of 464 months it was tantamount to adding probative value to those figures, thus invading the province of the jury.

It is agreed that it was not within the province of the actuary to testify that the plaintiffs have been deprived of a monthly contribution of $378.09, nor was it within her province to say how long any contribution might continue. If the witness had been asked to quote the value of $1 per month payable at the end of each month for periods of ten, twenty, thirty, forty years, then the jury with the assistance of counsel could project that figure into the future, for however long a period the jury should determine. The salient vice of the challenged testimony is implicit in the likelihood that the jury interpreted the actuary's presentation as testimony that decedent would continue to work as a switchman for 38 years and 8 months and that his

earnings would remain at $5500 per year and that his dependents would receive from him $378.09 per month for that period.

The damage issue cannot be resolved without a consideration of the instructions given to the jury on that subject.

Instruction No. 12 reads as follows: "The jury is instructed that certain mortality tables were received in evidence tending to show the life expectancy of the deceased and of the plaintiff. These tables are not conclusive and are not binding upon you. The deceased may have died before his expectancy of life was reached, and on the other hand he may have lived longer than his expectancy. The plaintiff may die before her expectancy has been reached or she may live longer than her expectancy. These tables were received as an aid to the jury in determining the probable expectancy of life of the deceased and of the plaintiff, and you are to give them such weight as you find they are entitled to receive in the light of your common sense and experience. The expectancy of life should not be used as a factor by multiplying the years of expectancy by the annual earnings. The award of damages for the loss of future contributions must be reduced to its present cash value and adequate allowance must be made for the earning power of money. You are entitled to consider all factors or circumstances which might tend to increase or decrease the pecuniary loss."

Instruction No. 17: "The jury is instructed that if you find the plaintiff is entitled to recover from the defendant in this action, that then the plaintiff is entitled to recover such damages as will justly and adequately compensate her and the surviving dependent children of the deceased for the pecuniary loss, past and future, sustained by them on

account of his death. In assessing damages, if any, and in determining the pecuniary loss of the widow and minor children, you may take into consideration the age of the widow and minor children, the age of the deceased, the probable expectancy of life of deceased and his widow, his health, his employment, and the amount of money which you find from the preponderance or greater weight of the evidence that it is reasonably certain he would have contributed to his wife in the future and to the children during their minority. In determining the amount of damages, if any, to be awarded for loss of future financial contribution to the widow and children, you are instructed that you are to determine the present cash value of such future lost contributions. The jury is instructed that if you find from a preponderance or greater weight of the evidence and with reasonable certainty that the deceased would have rendered services of a pecuniary or financial value to the plaintiff in the future and to her children during their minority, and if you further find that the plaintiff has established with reasonable certainty that she and her children have been deprived of the benefits of such future services by reason of the death of deceased, then you are at liberty to take into consideration and award fair and just compensation for such services, including counsel, training and guidance, that the minor children of deceased would have received from him during their minority. The present cash value of the benefits of which the widow and children have been deprived on account of the death of deceased, making adequate allowance for the earning power of money, is the proper measure of recovery."

Instruction No. 27 was as follows: "You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to Federal income taxes, and you should not consider any Federal or state in-

come taxes in fixing the amount of any award made plaintiff, if any you make."

Instruction No. 29: "You are instructed in estimating the present cash value of any future loss of contributions, you should also consider the fact that all persons do not live to the age of expectancy, and this is particularly true in the case of hazardous occupations such as that of railroading; that they may not work during all the years of their life; that their earnings may not remain stationary and that the reasonably to be expected earnings may not remain stationary and that the reasonably to be expected earnings may vary or diminish in the future."

Instruction No. 30: "The jury is instructed that the burden of proving the amount of damages that plaintiff may recover is upon the plaintiff and that she must establish the amount of damages by a preponderance or greater weight of the evidence, and with respect to future damages, she must establish the same by a preponderance or greater weight of the evidence to a reasonable certainty."

It is contended here that since the jury's verdict so closely approximated the projected result reached by the actuary, that the jury of necessity relied upon the two factors, namely, $378 per month and 38 years and 8 months, as established by the evidence; that by so doing the jury failed to take into consideration many uncertainties in life, namely, that decedent might not have lived 38 years, nor continued to be employed for that period, nor received the same pay throughout, that payments to his dependents would not remain the same after his children became of age, that his personal expenses might exceed $50 per month, etc.

In *Turrietta* v. *Wyche*, 15 A.L.R. 2d 407 (New Mexico 1949), the plaintiff sustained the loss of an arm. The court

said this at p. 417: "It may be that such testimony is speculative, as asserted by defendant; but no more so than any that has for its purpose the proof of future action or events. It is all problematical at best. It is not questioned that mortality tables are admissible, but possibly not one time in fifty would the life expectancy of any individual come within a year of the actual length of his life. It is, to say the least, problematical whether he would continue to live, continue in health, continue to work, continue to work with much the same effort and ability he has shown in the past, continue to have the desire and the opportunity to work. Also, that the amount of wages paid him and those following his occupation generally in the past, will continue to be paid; that the wage scale will not be materially affected by depression, strikes, inflation, or war; that interest rates will remain much as they are. However 'speculative' such testimony may be, it is the best that can be produced to establish earning capacity over a period of years. A jury of twelve average citizens ordinarily can be depended on to assess damages fairly, after they have heard and considered such evidence. The trial court did not err in admitting in evidence the testimony tending to prove plaintiff's earning capacity. The annuity tables were admissible in evidence to show present values of wages that might have been earned over a period of time, equal to plaintiff's life expectancy. This court has so held. *Johnson* v. *Santa Fe*, 35 N.M. 77, 290 P. 793; *Mares* v. *New Mexico Public Service Co.*, 42 N.M. 473, 82 P. 2d. 257; *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485, 36 S. Ct. 630, 60 L. ed. 1117, L.R.A. 1917 F, 367; *Chase* v. *Fitzgerald, supra.*"

The use of annuity tables has received legislative and judicial sanction: Vernon's Annotated Missouri Statutes, 442.530, Vol. 23, p. 30; *Peters* v. *K. C. Railways Co.*, 224 S.W. 25; Wisconsin Statutes (1933), sec. 314.06; Code

of Alabama 1953 (enacted Aug. 31, 1953), chap. 11, sec. 277; North Carolina Consolidated Statutes (1919), secs. 1790 and 1791; *Vicksburg and Meridian Railway Co.* v. *Putnam,* 118 U.S. 545; *Groat* v. *Walkup Drayage & Warehouse Co.,* 58 P. 2d 200 (Calif. 1939); *Colusa Parrot Mining & Smelting Co.* v. *Monahan,* 162 Fed. 276, 282 (9th Cir., 1908); Sutherland on Damages, (4th ed.) vol. 2, sec. 455, p. 1476.

To allow an actuary to testify to figures, which the jury might adopt as real, carries with it the danger that the jury will accept them not only as the actuary's explanation of his process of computation, but also as proof of contribution and life and work expectancy. Anticipating this very danger, the defendant caused the jury to be instructed that the actuary's testimony was not to be so interpreted. And on cross-examination of Miss Young, it was thoroughly developed that she did not mean to be saying what amount in dollars the plaintiffs would have received had decedent lived, nor for what period of time they would have received the same.

We are of the opinion that the proper method of assisting a jury in making damage calculations is for the actuary to use neutral figures. In the usual situation where hypothetical inquires are permissible, it is necessary that the expert assume a factual situation as reflected in the proof in order to insure that his testimony bears upon the issue to be determined. The actuary, however, is called upon only to describe to the jury a mathematical process that will simplify the jury's task of determining the present value of the contribution that plaintiffs would have received had decedent not been killed. To accomplish that purpose it is not necessary that he use figures that correspond with those appearing in evidence, and when he does so there is a danger that the jury may be misled. Once the

formula is before the jury, its application to the facts of the case is a matter for argument of counsel.

It is the contention of the appellant here that Miss Young's testimony was prejudicial because her calculations were predicated upon the figure $378.09 which was in violation of the rule laid down by the United States Supreme Court in the case of *Kansas City Railroad Co.* v. *Leslie,* 238 U.S. 599. Therein it was held that the decedent's contributions to his family are not to be determined by deducting from his gross income an arbitrary amount for his personal expenses. The unchallenged testimony is that Allendorf cashed his pay checks and turned the proceeds over to his wife. He was given an allowance of $50 per month for his personal expenses. Mrs. Allendorf was not cross-examined as to the arrangement. If $50 did not correctly reflect the amount of decedent's personal expenses, it was defendants' privilege to adduce proof to the contrary. Defendant argues that the amount spent on insurance premiums was not a contribution to Allendorf's dependents. The insurance was to go to his dependents upon his death and it gave them needed security to take care of such eventuality. In *Chicago and North Western Railway Co.* v. *Curl,* 178 F. 2d 497, 502, it was held that sums paid for railroad retirement are not to be deducted in computing plaintiff's probable earnings for purpose of an F.E.L.A. action.

As we have heretofore mentioned, the verdict of the jury was in excess of the highest figure given by the actuary. Appellee seeks to justify this result. Decedent was a young man 24 years of age—father of twin girls—and a third child was born posthumously. He was thrifty—frequently finding odd jobs in addition to his regular employment; he was handy with tools and a good workman, capable of

making improvements and repairs around the home that they had just purchased. The record shows that decedent was a kind and faithful father. It has been repeatedly held that the jury may award damages for such intangibles as the foregoing because they relate to his earning power and his disposition to continue to contribute to the welfare of his family. In *Miller* v. *Southern Pacific Co.,* 117 Cal. App. 2d 492, 256 P. 2d 603, (1955), a verdict of $80,000 was held not excessive even on the assumption that $60,000 covered the contributions and the pain and suffering for the twenty minutes decedent lived after his injuries. The court said that the other $20,000 could easily be accounted for as the jury's award to decedent's children for loss of the care and guidance of a father. The court said at page 613: "The difference, $20,000, readily could be accounted for as the award to Miller's children for the loss of their father's care, attention, instruction, training, advice and guidance; not an excessive amount for four children ranging from six to twelve years, bereft of a father who loved them, took a tender interest in them, and possessed the personal qualifications this father exhibited, to lead and guide them throughout the years of their development into the flower of womanhood and manhood." (*Norfolk and Western Railway Co.* v. *Holbrook,* 235 U.S. 625; *Giles* v. *Great Western Railway Co.,* 72 F. Supp. 493.) On the proof of such damages the court in the *Holbrook* case, at page 496, said: "We do not think that it is necessary to undertake to prove the value of the financial loss of such care, etc., anymore than would be necessary to prove the value of pain and suffering or of inconvenience and annoyance when they are elements of damages. The jury should assess the value of such loss in the exercise of their best judgment based upon the facts of each case." Another intangible element for which recovery is proper is services

which the deceased husband may have performed about the home. (*Michigan Central Railway Co.* v. *Veerland,* 227 U.S. 59; *Alabama Great Southern Railway Co.* v. *Cornet,* 214 Ala. 23, 106 So. 242.) In the case of *Ward* v. *Denver & Rio Grande Western Railroad Co.,* 96 Utah 564, 85 P. 2d 837, the court stated: "The husband's services in the home often have a pecuniary value which would cost money to replace such as chores, marketing, and the like. In this case the evidence is the plaintiff and her husband had bought a little place eight miles out in the country where they had cows, chickens, pigs and a garden and raised alfalfa; that the deceased did the work attending to the pigs, chickens, etc., besides his railroad work and that when not on duty with the railroad he worked on the place, all this work has a pecuniary value."

Furthermore the record shows that the deceased was a young man, energetic and ambitious, and at the early age of 24 was earning $5500 per annum. It was within reasonable contemplation that as he progressed in life his earnings would increase. In computing the contributions that the next of kin can reasonably expect the jury may take into account the fact that the deceased was enterprising and industrious and had good prospects for advancement. (*Bartlebaugh* v. *Pennsylvania Railroad Co.,* 78 N.E. 2d 410.) Competent statistical data supports a common sense observation that a man so young with so large an income is likely to continue to advance and to enjoy a substantially greater income in the future. See Fig. 4 in Dublin & Lotka, *The Money Value of a Man,* 65 (Rev. ed. 1946).

There are innumerable cases indicating that recovery is permissible for the full life expectancy even though the deceased might have retired at an earlier age. *New York, New Haven & Hartford Railroad Co.* v. *Zermani,* 200 F. 2d 240; *Fritz* v. *Pennsylvania Railroad Co.,* 185 F. 2d 31;

Atlantic Coast Line Railroad Co. v. *McKay,* 261 Ala. 66, 73 S. 2d 85; *Louisville & Nashville Railroad Co.* v. *Young,* 253 S.W. 2d 585; *Seibert* v. *Litchfield & M. Railway Co.* 159 S.W. 2d 612, 618.

Appellee also points out that the testimony of the actuary was needlessly favorable to defendant. Since the trial of the instant case this court has held in *Hall* v. *Chicago and North Western Railway Co.,* 5 Ill. 2d 135, "that the incident of taxation is not a proper factor for a jury's consideration, imparted either by oral argument or written instruction. It introduces an extraneous subject, giving rise to conjecture and speculation." The trial court required the actuary to consider present value of future contributions after deduction of income tax. Plaintiff's attorney acquiesced in this ruling as well as the giving of instruction No. 27. The estimate of the actuary, by deducting income tax, was more than $10,000 less than it would be without such deduction. Furthermore, the actuary's testimony was based upon future net earnings until the time decedent would have become 65 years of age. According to one mortality table Allendorf's expectancy was 68.21 years. The age of 65 was used because it is the normal age for railroad retirement. Thus plaintiffs unnecessarily limited their recovery by asking for computation only until age 65.

Both parties herein, in their briefs, seek comfort in the case of *Wetherbee* v. *Elgin, Joliet & Eastern Railroad Co.,* 191 F. 2d 302, but we find it of little value in resolving the problem before us. Therein the court observed that in its opinion an award of $80,000 was excessive and then expressed alarm at the large verdicts currently appearing, and, finding itself powerless to reverse the case because of the large verdict, proceedd to find a reason to accomplish the same result, and sought refuge in the rationale appearing in *Buchanan* v. *Chicago and North Western Railway Co.,*

159 F. 2d 576. At page 578 this appears: "However, the reviewing court can, if it thinks the verdict is not according to the weight of the evidence, scan the trial more closely for error." In its search for error the court determined that the jury had failed to follow the trial court's instructions that damages should be diminished in proportion to the amount of negligence attributable to the decedent, and for that reason alone reversed.

The foregoing considerations of the damage issue converge to this conclusion. Whatever evil might have appeared in the testimony of the actuary, to the prejudice of the defendant, is counterbalanced by the many other advantages as herein outlined. The ultimate question, of course, is not whether the trial was scrupulously free from error, but whether an error which occurred operated to the prejudice of the defendant. It is our opinion that the result in this case would have been no different even had the actuary employed neutral figures in her testimony. The defendant has been afforded a fair trial free of reversible error. The judgment is affirmed.

Judgment affirmed.

MR. JUSTICE KLINGBIEL, dissenting:

I cannot accept the conclusion of the majority that section 2 of our Injuries Act contravenes article VI of the United States constitution.

The relevant provision of that article is the supremacy clause, which says that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." (Ill. Rev. Stat. 1955, p. 4.) The present decision is thought to be required by the rule that "When a state refuses to hear pleas based on federally created right while it takes cognizance of those created by state law, there may be invalid discrimination because by the Supremacy Clause federal laws are made laws of the state." *United States* v. *Burnison,* 399 U.S. 87, 94, 94 L. ed. 675, 682.

The court relies on three United States Supreme Court decisions. In *Hughes* v. *Fetter,* 341 U.S. 609, 95 L. ed. 1212, and *First National Bank of Chicago* v. *United Air Lines,* 342 U.S. 396, 96 L. ed. 441, the local action was based on the wrongful death statute of another State, and the issue was whether the full-faith-and-credit clause of article IV requires recognition of a foreign cause of action when the law of the forum, on the particular facts, is in conflict with that of the foreign State. In the remaining case, *McKnett* v. *St. Louis & San Francisco Railway Co.,* 292 U.S. 230, 78 L. ed. 1227, an action under the Federal Employers' Liability Act was brought in Alabama to recover damages for an injury inflicted in Tennessee by a foreign railroad. Under former Alabama law the courts had no jurisdiction of a suit against a foreign corporation unless the cause of action arose within the State. An Ala-

bama statute of 1907 had restored jurisdiction as to causes of action arising under the law of another State, but left the proscription in effect as to causes of action arising under Federal law. It was held that the constitution prohibits State courts of general jurisdiction from declining jurisdiction solely because the suit is brought under a Federal law. The discrimination, it will be observed, occurred through the election by the State of Alabama to expressly permit an action of the same class to be maintained where it arose under the laws of another State. The decision was not that both must be recognized but that if one is voluntarily permitted the other must be. The question presented to this court is whether the holding in *Hughes* v. *Fetter, compelling* Illinois to recognize a cause of action arising under the laws of another State, is equivalent to voluntary choice to do so. Is this State basing a denial of jurisdiction upon the source of law sought to be enforced? Has Illinois refused to provide a forum solely because the suit is brought under a federal law? Has Illinois "discriminated" against rights arising under federal laws? I think not.

We are foreclosed by *Hughes* v. *Fetter* from questioning whether the full-faith-and-credit clause was meant to give to a mere cause of action the dignity accorded to judgments and other acts of a public nature. As an original proposition it would seem that the law of a State may be given full faith and credit without going so far as to say that every private cause of action thereunder must be enforced in every other State. The constitutional provision establishes a rule of evidence rather than of jurisdiction; and even where a cause of action has been reduced to judgment in the foreign State the clause has been held not to be violated by a statute precluding the maintenance of an action between nonresidents where the cause of action arose outside the State. (*Anglo-American Provision Co.* v. *Davis*

Provision Co., 191 U.S. 373, 48 L. ed. 225.) The provisions of the full-faith-and-credit clause, it has been said, do not affect the jurisdiction of the court in which a foreign judgment is offered in evidence. (*Wisconsin* v. *Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 32 L. ed. 239, 244.) At least in the absence of implications created by *Hughes* v. *Fetter*, there are limits to the extent to which the policy of one State may be subordinated to the policy of another. (See *Milwaukee County* v. *White Co.*, 296 U.S. 268, 273, 80 L. ed. 220, 225-226.) The extent to which the State of the forum shall apply in its own courts a rule of law of another State is itself a question of local law of the forum (see *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 445, 88 L. ed. 149, 158); and the distinction, as to full faith and credit, between foreign judgments and common or statutory law has long been recognized. 320 U.S. at 436, 88 L. ed. at 154.

But we are not obliged here to determine how far the full-faith-and-credit clause reaches. The source of Illinois's duty to enforce Federal rights is found, not in the full-faith-and-credit clause, but in the inherent characteristics of the Federal system. (*Mondou* v. *New York, New Haven & Hartford Railroad Co.*, 223 U.S. 1, 57-58, 56 L. ed. 327, 349.) The grant of power to Congress by the constitution is paramount over all legislative powers reserved to the States, and where concurrent power exists that of the Federal government must prevail. But before a State law can be invalidated on such grounds it must appear (1) that the power in question is possessed by Congress and (2) that it has been exercised. Assuming a Federal power to prescribe jurisdictional requirements for Illinois courts as to the present subject matter (but cf. *Minneapolis & St. Louis Railroad Co.* v. *Bombolis*, 241 U.S. 211, 60 L. ed. 961; *Bowman* v. *Lewis*, 101 U.S. 22, 25 L. ed. 989, 993,) I

cannot see where Congress has purported to exert it. If the Federal Employers' Liability Act had provided that all actions to enforce rights thereunder must be entertained in State courts, regardless of the place where the wrong occurred, then there would be a conflict between the two statutes; and if such a Federal requirement were valid, the supremacy clause would require the result reached by the court. But the Federal statute does not so provide. (Accord, *Douglas* v. *New York, New Haven & Hartford Railroad Co.*, 279 U.S. 377, 387-388, 76 L. ed. 747, 752.) It deals not with procedural questions but with substantive rights. There is no conflict on the jurisdictional question because Congress has not acted in the field. The opinion of the court does not even attempt to point out how such a command can be inferred from the language of the Federal Employers' Liability Act, nor can I find anything therein to indicate one. The rule is well established that where there exists a concurrent power of legislation in the States and in Congress, State power remains until the field is occupied by an exercise of the Federal power. It is unaffected by the mere existence of potential Federal action. (*Reagen* v. *Mercantile Trust Co.*, 154 U.S. 413, 38 L. ed. 1028.) The constitutional requirement is that "any legislation of a state, although in pursuance of an acknowledged power reserved to it, *which conflicts with the actual exercise of the power of Congress* over the subject of commerce, must give way before the supremacy of the national authority." (Emphasis supplied.) (*Smith* v. *Alabama*, 124 U.S. 465, 473, 31 L. ed. 508, 510.) The proviso in the case at bar offends neither the full-faith-and-credit clause nor the supremacy clause.

Section 2 of our Injuries Act makes no distinction on the basis of the source of the law sought to be enforced. It says nothing, in fact, about the subject. It provides simply

that no action can be brought here to recover damages for a death occurring elsewhere. At the time of its enactment and for 48 years thereafter it was never conceived that a State could not, upon rational considerations, decline to entertain these foreign causes of action, whether arising under the laws of another State or under the Federal Employers' Liability Act. (See *Douglas* v. *New York, New Haven & Hartford Railroad Co.*, 279 U.S. 377, 387, 73 L. ed. 747, 752.) In the *McKnett* case, upon which the majority opinion is based, the court expressly recognized that "Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act." (See, also, *Mondou* v. *New York, New Haven & Hartford Railroad Co.*, 223 U.S. 1, 56-57, 56 L. ed. 327, 349.) Yet this court, because of subsequent federal decisions construing the full-faith-and-credit clause to apply in cases of mere conflict of laws, now accomplishes the very thing which Congress has not even attempted.

It can hardly be doubted that section 2 of our Injuries Act was valid when enacted; that the rationale of *Hughes* v. *Fetter* does not operate to impair, *ab initio*, our injuries statute and the intermediate decisions sustaining its validity. (See *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-365, 77 L. ed. 360, 366-367.) Wherein, then, did Illinois "discriminate" against federal causes of action? Aid cannot be found in cryptic references to "the interplay of judicial decisions." The practical difference of treatment arose from the decision of the United States court in *Hughes* v. *Fetter*, not from action or choice by this State, whose statute makes no distinction whatever. Under such circumstances I think we would be warranted in giving effect to the statute in so far as its application is not limited by that decision.

Fifty years ago this court, in a well-reasoned opinion, concluded on similar facts that the proviso in question is valid, and that the circuit court had no jurisdiction. That decision, *Walton* v. *Pryor,* 276 Ill. 563, is now overruled because an "interplay of judicial decisions" has compelled our courts to take jurisdiction of actions arising under the laws of other states, and has prohibited a state from discriminating against actions arising under federal law. To continue applying the statute, except in so far as its application is precluded by the *Hughes* v. *Fetter* interpretation of the full-faith-and-credit clause, is not in my opinion a discrimination by Illinois. In effect the present holding amounts to an amendment of the federal statute to enlarge the jurisdiction of our courts, and an interpretation of the supremacy clause to require enforcement of the "amendment." Federal supremacy should not be stretched that far. I think some vitality still remains in the rule that "Each State, subject to restrictions of the Federal constitution, determines the limits of jurisdiction of its courts, the character of the conroversies which shall be heard in them, and how far its courts having jurisdiction of the parties shall hear and decide transitory actions where the cause of action has arisen outside of the State." *Wall* v. *Chesapeake & Ohio Railway Co.,* 290 Ill. 227, 231.

The presumption is that the statute in the case at bar is valid. One who challenges its validity assumes the burden of showing, upon rational grounds, that it violates some constitutional provision. This burden, in my opinion, has not been satisfied here.

First Opinion (Superseded).

Docket No. 33394—Agenda 10—March, 1955.
Ruth Elaine Allendorf, Admrx., Appellee, v. Elgin, Joliet and Eastern Railway Company, Appellant.

MR. JUSTICE DAILY delivered the opinion of the court:

James Allendorf, an Indiana resident, was killed on March 3, 1952, while performing his duties as switch foreman in the defendant's railroad yards at Gary, Indiana. Thereafter, his wife, Ruth Allendorf, filed this action in the circuit court of Cook County, as special administratix, to recover damages under the provisions of the Federal Employers' Liability Act. (45 U.S.C.A. sec. 51-59.) Trial was had by a jury, which, in addition to returning special findings as to negligence which were favorable to the plaintiff, also rendered a verdict for her in the amount of $127,500. After judgment was entered thereon, the defendant filed motions in arrest of judgment, for judgment notwithstanding the verdict, and for a new trial. As a basis for the former, it was contended that section 2 of the Injuries Act (Ill. Rev. Stat. 1951, chap. 70, par. 2,) precludes Illinois courts from assuming jurisdiction of a wrongful death action arising in a sister State. In opposition thereto, plaintiff argued that the statute, insofar as it so provided, was in conflict with the supremacy clause of article VI of the United States constitution, and was therefore unconstitutional. The defendant's motions were subsequently denied and direct appeal has been taken to this court. In addition to the constitutional issue presented, the defendant contends that the verdict was not properly supported by the evidence and that the trial court erred in allowing certain actuarial testimony.

We must first decide whether the courts of Illinois have the power to entertain a cause of action for a wrongful

death occurring outside of this State. Section 2 of our Injuries Act, after placing certain limitations upon the right of recovery, continues: "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place." At first it might appear that the intent of such a proviso was merely to limit recovery under the Illinois act to cases where the cause of action arose in this State. However, as was pointed out in *Stephen* v. *Illinois Central Railroad Co.*, 128 Ill. App. 99, the laws of a State have no extra-territorial effect and the Illinois remedy could only apply to actions originating in this State regardless of whether such a provision had been inserted. If the proviso is to be given any meaning whatsoever, it must have been intended to close the courts of this State to wrongful death actions arising outside our territorial limits. Furthermore, although the statute infers that place of death is controlling, we held in *Crane* v. *Chicago and Western Indiana Railroad Co.*, 233 Ill. 259, that the proviso should be construed as prohibiting actions where the *wrongful act* occurred without this State. Thus, if not in conflict with the United States constitution, this provision bars recovery in the present case.

The constitutional duty of each State to entertain wrongful death actions arising outside its geographical limits has been defined only by the evolutionary judicial process. The first and foremost case on this subject was *Mondou* v. *New York, New Haven and Hartford Railroad Co.*, 223 U.S. 1, 56 L. ed. 327. There, the State of Connecticut, although exercising jurisdiction over personal injury actions originating both within and without the State,

refused to try cases arising under the Federal Employers' Liability Act. The Supreme Court held that such act, although granting to the courts of each State concurrent jurisdiction for its enforcement, did not enlarge the powers of such courts nor require them to consider cases contrary to their morals, but requires them only to entertain such actions "when their jurisdiction, as prescribed by local law, is adequate to the occasion." Since Connecticut courts had and were exercising such power, they could not refuse to accept F.E.L.A. cases without violating the supremacy clause contained in article VI of the United States constitution. Thereafter, this court was faced with a similar problem. In *Walton* v. *Pryor*, 276 Ill. 563, an Illinois resident was killed while employed by a railroad in Missouri, and his administratrix sued in Illinois under the provision of the Federal Employers' Liability Act. We held, in a 4 to 3 decision, that since section 2 of the Injuries Act precluded our courts from accepting *all* wrongful death actions arising outside the State, we were not bound by the *Mondou* decision to entertain such F.E.L.A. actions. We were in no way discriminating against Federal legislation since our jurisdiction was not "adequate to the occasion."

Since our decision in the *Walton* case, the pendulum has been constantly swinging in the opposite direction. In *Kenney* v. *Loyal Order of Moose*, 252 U.S. 411, 64 L. ed. 638, the Supreme Court held that an Illinois court was bound by the full-faith-an-credit clause to honor an Alabama judgment based upon a wrongful death action originating in that State. The problem was again considered in *McKnett* v. *St. Louis and San Francisco Railway Co.*, 292 U.S. 230, 78 L. ed. 1227. In the latter case, Alabama had refused to allow an F.E.L.A. action which had arisen outside the State, on the grounds that the laws of that State,

although permitting personal injury actions arising under the laws of a sister State, did not allow such actions when based upon a Federal statute. The Supreme Court said: "The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal constitution. * * * The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a Federal act. A State may not discriminate against rights arising under Federal laws." However, it was there assumed that a State could deny jurisdiction to *all* out-of-State cases without violating a constitutional restriction. It remained for the United States Supreme Court to expose this fallacy in *Hughes* v. *Fetter,* 341 U.S. 609, 95 L. ed. 1212. There, an action had been brought in Wisconsin to recover for a wrongful death occurring in Illinois but had been dismissed because the laws of Wisconsin refused to recognize such out-of-State actions. The Supreme Court, in holding that Wisconsin must give full faith and credit to the Illinois statute, said: "That State [Wisconsin] has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, the exclusionary rule extending only so far as to bar actions for death not caused locally." The court again reiterated this principle by later holding that a Federal court, sitting in Illinois, could not refuse to entertain an action based upon the wrongful death statute of Utah. (*First National Bank of Chicago* v. *United Air Lines,* 342 U.S. 396, 96 L. ed. 441.) In its opinion, the high court said that Illinois had not met constitutional requirements in permitting such actions to be brought only if the defendant could not be served in the State where the cause arose.

It is to be seen then that a State can no longer refuse to entertain wrongful death actions originating under the laws of a sister State. Section 2 of our Injuries Act has thus been limited to this extent. As a practical matter, it can now only apply to suits arising under the laws of the United States or of a foreign country. In effect we have the same problem as was presented in the *McKnett* case. There, by statute, cases arising under a Federal or foreign statute were excluded. Here, by judicial decision, we have the same results. It would be folly indeed to say that a State may do by idleness what it could not do by action. Yet no one would assert that our legislature could, by statutory enactment, bar Federal actions from our courts. Neither do such actions offend our morals. Hundreds of wrongful death cases are tried in Illinois courts each year. Proceedings under the Federal Employers' Liability Act are quite common. Even suits to recover damages for wrongful acts committed outside this State are permitted, whether under the F.E.L.A. or the laws of another State, as long as the wrongful act resulted in personal injuries rather than death. (*Avance* v. *Thompson,* 387 Ill. 77; *Taylor* v. *Southern Railway Co.,* 350 Ill. 139.) We can see no reason for this fine distinction and hold, in view of the more recent pronouncements upon this subject, that our prior decision in *Walton* v. *Pryor* cannot now be considered as controlling and that insofar as section 2 of the Injuries Act prevents the bringing of actions within this State to recover damages for wrongful acts resulting in death, committed without our geographic limits, it is contrary to article VI of the United States constitution and, therefore, unconstitutional.

The defendant next contends that the verdict was not properly supported by the evidence. In order to decide this question we must first look to the facts of the case.

James Allendorf, the decedent, reported for work at 11:00 P.M. on the night of March 2, 1952, for a normal eight-hour shift, and was assigned as foreman of a switching crew in the defendant's general classification yard at Gary, Indiana. In addition to the foreman, the crew consisted of an engineer and fireman, who were stationed in the engine, a field man and a head man. It was the crew's duty to arrange the railroad cars in proper order for their delivery to neighboring industries. To do this it was necessary to go into various tracks located in an area known as the "F" Yard and pull out cars and place them on other tracks. Prior to the accident, the Allendorf crew was working on the track known as the "F" Yard lead, which ran opproximately in an east and west direction. Immediately to the north was the "L" Yard lead which ran parallel to and was approximately twelve feet from the "F" Yard lead. Between these tracks were various switch stands, which controlled the movements into the various tracks, and at the far westerly end was located a floodlight tower. Allendorf's engine was at all times during the course of the evening headed in a westerly direction. Since it was necessary for him to pass signals to his engineer, Allendorf normally stood between the "F" and "L" Yard leads. During the same night, a crew, under the supervision of Frances Fay, was assigned similar duties in the "N" Yard. However, at approximately 2:30 A.M., the Fay crew was sent over to the "L" Yard to remove defective cars from a train that had already been made up. Their job was to "kick" the defective cars down the "L" Yard lead into a different track. Since their engine was also headed in a westerly direction, the Fay crew worked on the north side of the "L" Yard lead. Thus, only the Allendorf crew was located between the "F" and "L" Yard leads. The engines used by both crews were diesel

operated, were equipped with both headlights and back-up lights, and could travel with equal ease in either direction. The head man on Allendorf's crew testified that immediately before the accident a mistake had been made by him and certain cars were placed on the wrong track. He and Allendorf had discussed the matter at approximately 3:00 A.M. while standing in the center between the two lead tracks "L" and "F," and as he walked away he turned to see Allendorf's lantern go down. It was later shown that Allendorf had been struck by the defective cars being kicked down the "L" Yard lead. Others stated that after this conversation, they saw Allendorf's lantern move a step or two and then fall. The head man further testified that he immediately climbed upon the "F" lead cars and looked in a westerly direction, hoping to see the engine that had shoved the defective cars, but that he saw neither an engine nor its back-up light. Nussle, the engineer in Allendorf's crew, testified that although he was looking in a westerly direction before the accident, he did not know an engine was working on the "L" Yard lead nor did he see any back-up light. However, both the engineer and fireman of the Fay crew testified that the headlights and back-up lights of their engine were on at all times prior to the accident. There was much conflicting evidence as to whether Allendorf knew that another crew was working on the adjoining "L" Yard lead. Fay, the "L" Yard foreman, stated that he had told his field man to warn the Allendorf crew of the impending movement on the "L" Yard lead. The field man stated he had told a member of the Allendorf crow, but not Allendorf himself. The yardmaster swore that at about 2:30 A.M. he informed Allendorf that the Fay crew would be kicking cars down the "L" Yard lead. He further testified that later he warned the Allendorf crew by loudspeaker. This was not verified

by any member of the crew. The evidence was also extremely conflicting as to the degree of lighting in the accident area. It did show, however, that although the cars which struck Allendorf were neither lighted nor accompanied by any member of the switching crew, such was the usual custom in such operations. Other testimony showed that after allowing for the car overhang, the working distance between the "F" and "L" Yard leads was approximately six and one-half feet.

In order to recover under the Federal Employers' Liability Act it is necessary to prove that the defendant was negligent and that such negligence was the proximate cause of the accident, in whole or in part. (*Tennant* v. *Peoria and Pekin Union Railroad Co.* 321 U.S. 29, 88 L. ed. 520.) The plaintiff contended and the jury specifically found that the defendant did not warn the decedent of the intended movement of cars on "L" Yard lead, that the rear light on the Fay engine was not lighted prior to and at the time of the accident, and that the decedent was not himself guilty of negligence. In her complaint the plaintiff had also alleged that the area was improperly lighted and that the defendant had failed to furnish a safe place to work.

Judges are not free to reweigh the evidence and set aside the jury verdict merely because they, as individuals, might have arrived at different conclusions. (*Tennant* v. *Peoria and Pekin Union Railroad Co.* 321 U.S. 29, 88 L. ed. 520.) Only where there is a complete absence of probative facts to support the conclusion reached, does reversible error appear. (*Starck* v. *Chicago and North Western Railway Co.* 4 Ill. 2d 616; *Bonnier* v. *Chicago, Burlington & Quincy Railroad Co.* 2 Ill. 2d 606; *Wetherbee* v. *Elgin, Joliet and Eastern Railroad Co.* 191 Fed. 2d 302.) As the court said in *Lavender* v. *Kurn,* 327 U.S. 645, 90 L. ed. 916: "But where, as here, there is an evidentiary

basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." Although the evidence in this case is, upon some points, conflicting, we cannot say as a matter of law that the verdict was not properly supported by the evidence. After considering the record as a whole, we are of the opinion that there was sufficient evidence presented from which a jury could reasonably conclude that the defendant was guilty of the negligence charged and that such negligence was the proximate cause of the decedent's death.

Finally, the defendant contends that the trial court erred in allowing certain actuarial testimony. The record discloses that Allendorf, at the time of his death, on March 3, 1952, was 24 years of age and left surviving a 28-year-old widow and twin daughters of the age of one year. Five months thereafter, a third daughter was born of this marriage. The widow, plaintiff herein, testified that her husband's total gross income for 1951 was $5542.70 and his earnings for the two months immediately preceding his death amounted to $977.38. She further stated that it was her duty to handle the family finances and Allendorf, at all times, turned his pay checks over to her for this purpose. From the amount received, she gave Allendorf $50 a month for his personal expenses and used the balance to make payments upon the house, automobile, insurance policies, household appliances, and other household expenses. A banker testified that a widow, under similar circumstances, could expect a 2½%-3% rate of return upon her investments. Elizabeth Young, an actuary, testified that Allendorf's 1951 income tax based upon a

$5542.70 annual income, should have been $405.64. After deducting incomes taxes and the $50 per month alloted to the decedent for his personal expenses, she computed Allendorf's net monthly income for 1951 as $378.09. The actuary was also allowed to testify that the present cash value of this monthly figure for the period from the date of trial until the decedent would have attained his 65th birthday, using a compound interest discount rate of 2½%, was $112,904.37. By using a 3% rate, the amount would have been $104,418.69. She further stated that using the same monthly basis, Allendorf could have been expected to earn an additional $8527.22 during the period between the accident and date of trial. If the monthly figure had been computed on the basis of $1952 income, the amounts would have been slightly larger. The defendant argues that these computations are misleading because they were based upon Allendorf's future gross income rather than upon the amount that he could have been expected to contribute to his dependents. With this contention we cannot agree. It is true that the proper measure of damages in such a case is the present cash value of the benefits which might reasonably have been received by the widow during her lifetime and by the children during their minority. (*Wetherbee* v. *Elgin, Joliet and Eastern Railway Co.* 191 F. 2d 302.) Actuarial tables are admissible for the purpose of aiding the jury in their computation. (*Starck* v. *Chicago and North Western Railway Co.* 4 Ill. 2d 616; *Avance* v. *Thompson,* 387 Ill. 77.) They are, however, not binding upon its final determination. In this case, the widow testifield that with the exception of Allendorf's personal allowance, his entire take-home pay was used for family expenses. The court in its instructions to the jury pointed out that the actuarial tables were not conclusive but need be given only such weight as their common sense dictated, and that the measure of damages, if awarded, should be

the amount that the decedent would have reasonably contributed "to his wife in the future and to the children during their minority." The jury was free to reduce, increase, or entirely reject these actuarial amounts. These figures were based, not upon the decedent's gross income as in the case of *Kansas City Southern Railway Co.* v. *Leslie,* 238 U.S. 599, 59 L. ed. 1478, but rather upon the actual contributions made to his dependents. It may well be that Allendorf used the family house and enjoyed a measure of the family conveniences. We cannot say, however, that by his so doing, these benefits to other members of the family were proportionately reduced. It is our opinion that the trial court did not, by allowing such actuarial testimony, commit reversible error.

For the reasons stated, the judgment of the circuit court of Cook County is, therefore, affirmed.

Judgment affirmed.

FINAL JUDGMENT BELOW
UNITED STATES OF AMERICA

State of Illinois
Supreme Court—ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of March in the year of of Lord, one thousand nine hundred and fifty-six, within and for the State of Illinois.

Present: Harry B. Hershey, Chief Justice

Justice Walter V. Schaefer — Justice Joseph E. Daily
Justice Ralph L. Maxwell — Justice George W. Bristow
Justice Charles H. Davis — Justice Ray I. Klingbiel
Latham Castle, Attorney General
Robert G. Miley, Marshal

Attest: Fae I. Searcy, Clerk pro tempore

Be It Remembered, that, to-wit: on the 22nd day of March 1956, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Ruth Elaine Allendorf, as Special Adiministratrix of the Estate of James Dale Allendorf, deceased, Appellee
No. 33394 vs.
Elgin, Joliet and Eastern Railway Company, a corporation, Appellant

Appeal from Circuit Court Cook County 52 C 15351 Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as

matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County aforesaid, Be Affirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant costs by her in this behalf expended, to be taxed, and that she have execution therefor.

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No. 182

IN THE

Supreme Court of the United States

October Term, A. D. 1955

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Petitioner,

vs.

RUTH ELAINE ALLENDORF, as Special Administratrix of the Estate of James Dale Allendorf, Deceased,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

---

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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vs.

RUTH ELAINE ALLENDORF, as Special Administratrix of the Estate of James Dale Allendorf, Deceased,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS FOR REVIEW

1. Can a state constitutionally refuse jurisdiction to its courts to hear actions under the Federal Employers' Liability Act for deaths occurring outside the state when those courts have jurisdiction to hear actions for out-of-state deaths brought under the wrongful death statutes of other states?

2. Did it constitute reversible error, in all the circumstances of the case, to permit an actuary to testify as to the present worth for a given period of a sum which the jury could have found to be the expected contributions per year of the deceased to his wife and his minor children?

ARGUMENT

I. The Illinois Statute Was Correctly Held to Be An Unconstitutional Discrimination Against a Federally-created Cause of Action.

In 1903 Illinois enacted a statute (Pet. 4) which purports to deprive the courts of that state of jurisdiction to hear certain actions for deaths which occurred outside the state. *Ill. Rev. Stat., c.* 70, §2. In 1951 this Court held that a very similar Wisconsin statute was invalid in so far as it applied to actions for out-of-state deaths brought under the wrongful death statute of another state; this result was required by the Full Faith and Credit Clause of the United States Constitution. *Hughes v. Fetter*, 341 U.S. 609 (1951). That decision was followed one year later in a case involving the very Illinois statute here in question. *First National Bank of Chicago v. United Airlines*, 342 U.S. 396 (1952). These decisions are not challenged by petitioner. The present state of the law, as it applies to the statute here in question, was summarized by the Illinois Supreme Court in the present case:

> "It is clear that a State can no longer refuse to entertain wrongful death actions which originate under the laws of a sister State, if, like Illinois, it entertains such actions when they arise under its own laws. Section 2 of our Injuries Act has thus been limited to apply only to suits arising under the laws of the United States or of a foreign country. As a practical matter, this means that it applies only to cases arising under the laws of the United States." (Pet. App. 3.)

Thus the question posed by the present case is whether a state which entertains actions for out-of-state deaths where suit is brought under a state wrongful death act can refuse to hear such actions where suit is under the Federal Employers' Liability Act. Two separate lines of authority in

this Court indicate, as held by the Illinois Supreme Court, that a state statute with such an effect is invalid as repugnant to the Supremacy Clause of the United States Constitution.

Soon after the passage of the FELA, this Court held that state courts were bound to entertain suits under that Act when their ordinary jurisdiction is appropriate for such suits. *Mondou v. New York, N. H. & H. R. Co.*, 223 U.S. 1, 56-7 (1912). The Illinois courts, like the Connecticut courts involved in the *Mondou* case, are courts of general jurisdiction. Every day they hear death actions, many of which arise from deaths occurring outside Illinois. Every day they hear personal injury actions for injuries inflicted outside the state, whether the suit is brought on common law grounds or under the FELA. They are perfectly competent to adjudicate a death claim under FELA though the death occurred in some other state. The only barrier to such an adjudication is the statute which purports to withdraw jurisdiction of this class of cases. The problem was anticipated, in a case involving the identical Illinois statute, by Justice Holmes when he made the oft-quoted statement that:

> "* * * it is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent."

Kenney v. Supreme Lodge of the World, 252 U.S. 411, 415 (1920). Without more the Illinois statute conflicts with the supremacy clause and is unconstitutional in so far as it seeks to deny jurisdiction to otherwise competent courts to hear claims under FELA for out-of-state deaths.

The statute can equally well be held unconstitutional as a palpable attempt to discriminate against a Federally-created right solely because of the Federal nature of that

right. The authoritative construction of the statute by the court below is that:

> "As a practical matter, this means that it applies only to cases arising under the laws of the United States." (Pet. App. 3.)

For practical purposes the statute, as construed and applied, is identical with the statute involved in *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U.S. 230 (1934). That case involved an Alabama statute which gave the courts of that state jurisdiction over suits for wrongs which occurred in another state brought pursuant to the common law or statutes of such other state. The Alabama court held that the statute did not authorize suit under a Federal statute for an out-of-state wrong, and refused to entertain an FELA suit for an injury which occurred in Tennessee. A unanimous Court, speaking through Justice Brandeis, held that as so construed, the statute was unconstitutional, and required Alabama to hear the suit:

> "While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, * * * the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a Federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a Federal act. A state may not discriminate against rights arising under Federal laws."

Id. at 234.

The *McKnett* case has been frequently cited by this Court, always with approval. It controls the present decision. The result for which petitioner contends would mean that if a passenger and an employee are killed in a crash in Gary, Indiana, the action for the death of the passenger, brought under FELA, could not be heard in Illinois. This would be

exactly that "denial of jurisdiction * * * based solely upon the source of the law sought to be enforced" condemned in the *McKnett* case. It would be a case where, as said also in *McKnett,* "the plaintiff is cast out because he is suing to enforce a Federal act." Illinois lacks constitutional power to make such a discrimination.

Petitioner claims that the result below conflicts with the decisions of this Court in *Douglas v. New York, N. H. & H. R. Co.,* 279 U.S. 377 (1929); *Missouri ex rel Southern Ry. Co. v. Mayfield,* 340 U.S. 1 (1950), and *Ex parte Collett,* 337 U.S. 55 (1949). To the extent that these cases are in point, they support the result below. All three cases deal with the availability of the doctrine of *forum non conveniens,* by which a court under certain circumstances has discretion to refuse to hear suits properly within its jurisdiction. Our case concerns a complete denial of jurisdiction, without any scope for discretion, in suits under the FELA.

In the earliest of these cases, Justice Holmes said:

> "It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty."

Douglas v. New York, N. H. & H. R. Co., 279 U.S. 377, 387-8 (1929). And in the *Mayfield* case, 340 U.S. 1, at 4, the Court held that a state is free to adopt the discretionary doctrine of *forum non conveniens* provided that it

> "enforces its policy impartially, see *McKnett v. St. Louis & S. F. R. Co.,* 292 U.S. 230, so as not to involve a discrimination against Employers Liability Act Suits * * *."

But the Illinois policy contained in §2 of the Injuries Act cannot be enforced by that state against suits under death acts of sister states. Its only possible operation, as the Supreme Court of Illinois has noted, is to "cases arising under the laws of the United States."

The present case has nothing to do with *forum non conveniens*. It has to do only with whether a state can deny jurisdiction to otherwise competent courts to hear actions under a Federal statute when the courts are allowed to hear similar actions under state statutes. The result below, that a state cannot constitutionally do this, does not conflict with any decision of this Court. It is compelled by a long line of such decisions, from *Mondou* through *McKnett* down to *Mayfield*. The result below is correct, and raises no issue not already well settled in this Court's books. It does not merit review here.

II. The Decision Below That the Admission of Certain Actuarial Testimony Did Not Constitute Prejudicial Error Presents No Question Justifying Review Here.

If, as petitioner contends, the court below had "squarely held that as a matter of law the pecuniary loss to a widow and minor dependents must be based on the decedent's gross earnings, less only his purely personal expenditures, extending over his entire life expectancy" (Pet. 22—see also Pet. 3, 24), such decision might well justify review by this Court. But no such issue was before the Illinois Supreme Court and it made no such holding.

The present case contains no issue as to the measure of damages. Instruction No. 17 (Pet. App. 9-10) properly told the jury that plaintiff should be awarded compensation for the pecuniary loss sustained by the dependents. The jury was told that in determining this amount they should consider the present value of "the amount of money which you find from the preponderance or greater weight of the evidence that it is reasonably certain he would have contributed to his wife in the future and to the children during their minority." Thus the trial court was careful to follow the rule as

to damages laid down by this Court in *Michigan Central R. R. Co. v. Vreeland,* 227 U.S. 59 (1913), and in *Kansas City Southern Ry. Co. v. Leslie,* 238 U.S. 599 (1915). The case last cited held that it was error to instruct the jury that damages are to be determined by deducting from the gross income of the deceased an arbitrary amount for his personal expenses. The instruction properly condemned in the *Leslie* case would have allowed the jury to award the "net earnings," consisting both of the sum contributed to the dependents and of whatever amount the deceased was able to save. But in our case the instruction limited the jury to the "contributions," and the evidence was directed solely to that issue. The unchallenged testimony was that Allendorf cashed his paychecks and turned the proceeds over to his wife. She then gave him an allowance of approximately $50 a month for his own use (Abst. 93-94). The average amount turned over to the wife was $428.09 per month, and thus the amount retained by the wife was $378.09 per month. It was for the jury to determine whether this is the amount which it is reasonably certain Allendorf would have contributed to his wife in the future and to the children during their minority, or whether the contributions were some larger or smaller sum.

Nor is there any issue as to the period for which the pecuniary loss of decedent's children is to be included in the damages. Petitioner's assertion that the court below held that, as a matter of law, damages must be based on contributions to his minor dependents during his entire lifetime rather than during their minority (Pet. 8, 25-26) can most generously be described as a misreading of the record.

In Instruction No. 17, the basic instruction on damages, the jury was told three separate times that they should award such sum as would compensate for the pecuniary loss of the widow "in the future" and that of the children "during their

minority" (Abst. 215—Pet. App. 10). Further, as is shown by the transcript, which may properly be adverted to in appellate proceedings in Illinois, respondent's counsel was scrupulous, in his argument to the jury, to point out that they must limit recovery in so far as the children were concerned to the period of their minority (Tr. 796, 800-801). Petitioner claims that the decision below conflicts, on this point, with *Norfolk & W. R. Co. v. Holbrook*, 235 U.S. 625 (1915); *Chicago, B. & Q. R. Co. v. Kelley*, 74 F.2d 80 (8th Cir. 1934), and *Thompson v. Camp*, 163 F.2d 396 (6th Cir. 1947), cert. denied 333 U.S. 831 (1948). Those decisions hold that the jury must be instructed to limit recovery for minor children to their minority. The jury was so instructed. Petitioner's contention here is so utterly without merit that the Illinois Supreme Court did not feel compelled even to discuss it in that court's two exhaustive opinions in this case.

Neither in the court below nor here was there any valid issue as to the measure of damages. Instead, the issue has been as to the proof offered in support of such damages. Specifically, petitioner objected below and objects here to the admission of actuarial testimony as to the present worth of $378.09 for the period until Allendorf would have been 65 years old.

The case of *Wetherbee v. Elgin, J. & E. Ry. Co.*, 191 F.2d 302 (7th Cir. 1951), cert. denied 346 U.S. 867 (1953), on which petitioner puts much reliance, is not in point. There it was held reversible error to have allowed actuarial testimony as to the present worth of decedent's gross earnings. We do not dispute that holding, for, as the Seventh Circuit said,

> "he could not properly be permitted to use as the basis for his calculations, figures or elements which the jury could not use. The only figure the jury was authorized

> to use to reduce to its present cash value was the pecuniary benefits which the beneficiaries might reasonably have received from decedent."

Id. at 311. But in our case the actuary testified as to the present worth, not of the gross earnings, but of the contributions which, on the evidence, the jury could find that decedent would have made. The actuarial testimony was based, then, on the very measure which the jury is required to use, and assumed a figure which the jury could reasonably have found.

It has long been well settled that the jury is entitled to assistance in determining present worth. *Vicksburg & M. R. Co. v. Putnam,* 118 U.S. 545, 554 (1886). In FELA cases it is left to the law of the forum to decide whether this assistance should be by admission of interest and annuity tables or by testimony of an actuary. *Chesapeake & O. Ry. Co. v. Kelly,* 241 U.S. 485, 491 (1916). The Illinois Supreme Court, exercising a choice thus left open to it, determined upon a middle course. It held that actuarial testimony is admissible, but that the proper method is for the actuary to use neutral figures, rather than for him to assume a particular amount of contributions or a particular period of time (Pet. App. 13). It feared that assumptions of this sort might carry the danger that the jury would be misled, and would give probative weight to the particular choices made by the actuary.

We have arrived, at last, at the narrow point which petitioner tenders to this Court for review. Within the area of choice left to the states by *Chesapeake & O. Ry. Co. v. Kelly,* 241 U.S. 485, 491 (1916), Illinois could have determined that the actuarial testimony below was the proper way to prove present worth. It chose rather to approve a more limited use of actuarial testimony. The only issue which could possibly remain for scrutiny by this Court is petitioner's

claim that, having held that the kind of testimony admitted by the trial court gives rise to a danger that the jury might be misled, the Illinois Supreme Court should therefore have reversed and ordered a new trial even though it found, in the particular case, that the jury had not been misled. This would be a remarkable issue indeed for review by a Court which has expressly left it to the states to determine how present worth is to be proved, and which has further held that:

> "Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act."

Lavender v. Kurn, 327 U.S. 645, 654 (1946).

As the court below pointed out, petitioner anticipated the danger thought to be present in the kind of actuarial testimony used in this case, and took effective steps to guard against that danger (Pet. App. 13). Instructions Nos. 12 and 29 (Pet. App. 9, 11), given at the instance of petitioner, were appropriate cautions against allowing conclusive effect to this testimony. And, as the court below said:

> "on cross-examination of Miss Young, it was thoroughly developed that she did not mean to be saying what amount in dollars the plaintiffs would have received had decedent lived, nor for what period of time they would have received the same." (Pet. App. 13.)

Finally, the assumptions made by the actuary were needlessly favorable to petitioner: the jury might well have found that in the ensuing 40 years decedent's contributions to his dependents would have increased—compare *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955), reversing 216 F.2d 772 (4th Cir. 1954)—and it might have found that his contributions would not have ceased at age 65 when his expectancy was 68.21 years (Pet. App. 16-17).

The Supreme Court of Illinois, weighing all these factors, concluded that the jury had not been misled, saying:

> "It is our opinion that the result in this case would have been no different even had the actuary employed neutral figures in her testimony." (Pet. App. 18.)

The lower court's judgment on this point, turning as it does on the particular circumstances of a particular case, scarcely seems to be the sort of matter which this Court will wish to review. The conflicts petitioner claims to have discovered between the present case and decisions of this Court and the Courts of Appeals (Pet. 19) are non-existent. Recovery here was limited to "contributions" rather than "net earnings," thus meeting the requirements of *Kansas City So. Ry. Co. v. Leslie,* 238 U.S. 599 (1915). Recovery for the pecuniary loss of decedent's children was limited to the period of their minority, as required by *Norfolk & W. R. Co. v. Holbrook,* 235 U.S. 625 (1915); *Chicago, B. & Q. R. Co. v. Kelley,* 74 F.2d 80 (8th Cir. 1934), and *Thompson v. Camp,* 163 F.2d 396 (6th Cir. 1947), cert. denied 333 U.S. 831 (1948). Finally, the actuarial testimony was based entirely on calculations, figures and elements which the jury could adopt in the computation of damages, as required by *Wetherbee v. Elgin, J. & E. Ry. Co.,* 191 F.2d 302 (7th Cir. 1951), cert. denied 346 U.S. 867 (1953). In addition—though respondent does not concede that the *Wetherbee* case or any other authoritative case has so held—the proof of damags met the tests which petitioner reads into the *Wetherbee* opinion, in that it was confined to Allendorf's "work expectancy" rather than his life expectancy, and in that federal income taxes were deducted and the jury was instructed that the award was not subject to tax (Pet. App. 17).

In short, we have here no conflict with controlling decisions nor question of importance in the administration of a Federal statute. We have, rather, only another of the many cases in which a railroad, having inflicted a great loss on the family of its employee, will grasp at any straw to delay paying that family a moderate sum as compensation for the loss.

CONCLUSION

The issue here as to the constitutionality of the Illinois statute is well settled by nearly half a century of decisions in this Court. And the holding below as to damages represents merely a routine application of well-understood principles.

The petition for a writ of certiorari should, for the foregoing reasons, be denied.

Respectfully submitted,

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Petitioner.

Petitioner's Reply Brief

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I.

REPLY TO RESPONDENT'S POINT I.

1. The Mondou case distinguished.

The respondent relies upon *Mondou* v. *New York, N. H. & H. R .Co.*, 223 U.S. 1, 56-7. But that case held only that actions under the Federal Employer's Liability Act might

be maintained as of right in state courts only "where their jurisdiction, as prescribed by local laws, is adequate to the occasion." But when the present Federal Employer's Liability Act was enacted, April 22, 1908, the jurisdiction of Illinois state courts, as prescribed by Illinois law, was *not* "adequate to the occasion." Since the amendment of May 13, 1903 (Laws of Ill. 1903, p. 217, §1; and see the Historical note to Smith-Hurd Ill. Ann. Stat., Ch. 70, §2), the Illinois courts had had no jurisdiction of *any* out-of-state death action. "The general rule, bottomed deeply in belief of the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them". Hart: The Relations Between State and Federal Law, 54 Col. L. Rev. 489, at 508 (1954); Frankfurter, J., concurring in *Brown* v. *Gerdes,* 321 U. S. 178, at 189. When Congress sought to avail itself of the courts of Illinois for the enforcement of the newly-enacted statute, it found them wholly lacking in jurisdiction of a cause of action for wrongful death occurring outside Illinois.

It is no answer to say, as respondent does, that every day Illinois courts hear death actions, many of which arise from deaths occurring outside Illinois. (Resp. brief, p. 3) After the decisions in *Dougherty* v. *American McKenna Co.,* 255 Ill. 369; *Walton* v. *Pryor,* 276 Ill. 563, and *Wall* v. *Chesapeake & O. Ry. Co.,* 290 Ill. 227, the last of which was decided in 1919, Illinois courts heard *no* out-of-state death cases until after this Court's decision in *First Nat'l. Bank* v. *United Air Lines,* 342 U.S. 396, on March 3, 1952, *the very day of Allendorf's death.* (Abst. 2) We believe that this is the first out-of-state death case to be tried in an Illinois court in nearly forty years, and it is certainly the first to reach a reviewing court since 1919. The argument that Illinois courts are experienced in the trial of such cases, although relied upon in the first opinion below, was *not* relied upon in the final opinion of the Illinois Supreme Court.

2. The McKnett case distinguished.

Nor is the statute "a palpable attempt to discriminate against a Federally-created right" so as to invoke the principle of *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U.S. 230. In that case, by an amendment the Alabama legislature had authorized suits against foreign corporations where the cause of action arose under the laws of another state, but not when the cause of action arose in another state, but under federal law. As construed by the Alabama court, the statute as amended was a direct and intentional discrimination against a Federally-created right.

Here the Illinois statute attempts no such discrimination. The language of the *proviso* applies to all death actions arising outside of Illinois, without regard to whether the action arises under state, federal or foreign law. For more than fifty years, the courts of Illinois so construed the statute and applied it impartially. The validity of similar statutes has repeatedly been sustained. *Chambers* v. *Baltimore & O. R. Co.*, 207 U.S. 142; *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, 140 N. E. 94; see 158 A.L.R. 1029-1031 and 39 Yale L. J. at 396. In *Herb* v. *Pitcairn*, 324 U.S. 117, this Court expressed no doubt as to the power of Illinois to limit the jurisdiction of a city court to actions arising within its territorial boundaries, and to apply that restriction to F.E.L.A. cases. We submit that it follows that a state may validly limit the jurisdiction of its circuit courts to actions arising within the territorial boundaries of the state. Again we point out that in *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U.S. 377, this Court, speaking through Mr. Justice Holmes, held that the Federal Employer's Liability Act "does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so" and that "there

is nothing in the Acts of Congress that purports to force a duty on such courts as against an otherwise valid excuse." In twenty-seven years since that decision, neither the Congress nor this Court has ever declared any contrary federal policy with respect to F.E.L.A. cases which, under the Supremacy Clause would override state policy.

In a comment on the *Douglas* case in 39 Yale L. J. 388, the author points out that "an otherwise valid excuse" for refusing to entertain out-of-state F.E.L.A. cases is "as a means of controlling the abuses of imported litigation." In the briefs on rehearing we pointed out to the court below that statistics released by the Association of American Railroads disclose that in the period from September 1, 1952, to March 31, 1955, a period of 31 months, more than 62-½% of all F.E.L.A. claims in the entire country were concentrated in the hands of 18 law firms in 12 cities in 8 states. (Supplemental Brief on Rehearing, pp. 3-5) More recent statistics, to the end of 1955, indicate that these 18 law firms now handle 71% of the F.E.L.A. claims. Significantly in three of those states—California, Minnesota and Utah—the highest courts have recently adopted the doctrine of *forum non conveniens* as applied to out-of-state F.E.L.A. cases overruling prior decisions to the contrary. *Price* v. *Atchison, T. & S. F. Ry. Co.,* 42 Cal. 2d 577, 268 P. 2d 577, 268 P. 2d 457; *Johnson* v. *Chicago, B. & O. R. Co.,* 243 Minn. 58, 66 N. W. 2d 763; *Mooney* v. *Denver & R. G. R. Co.,* 118 Utah 307, 221 P. 2d 628. These decisions, and others in Oklahoma, South Carolina and Georgia, and the earlier decisions in New York and Ohio cited in the petition here and in the annotation in 43 A.L.R. 2d 744, constitute the significant "interplay of judicial decisions" which should have controlled the decision below.

The only basis upon which the Court below that the Illinois statute discriminated against F.E.L.A. cases was that since this Court's decisions in *Hughes* v. *Fetter,* 341 U.S.

609, and *First Nat'l. Bank* v. *United Air Lines,* 342 U.S. 396, "as a practical matter * * * [the Illinois statute] * * * applies only to cases arising under the laws of the United States." (App. p. 3) Obviously the statute also applies to death cases arising under the laws of other nations, a not inconsiderable factor today with transcontinental railroads and world-wide air line and steamship operations. For example, Chicago newspapers listed approximately 100 Chicago area residents as passengers in The S.S. Stockholm—S.S. Andrea Doria collision. But the restricted application of the Illinois statute results only from this Court's decisions, not from any policy declared by Illinois. The Illinois court has confused an unintended difference in result, because of a difference in constitutional provisions, with an intentional discrimination. Illinois never established "a denial of jurisdiction * * * based solely upon the source of the law sought to be enforced" as in the *McKnett* case; Illinois sought to lay down a uniform non-discriminatory policy, and it followed that policy for more than fifty years. Only this Court's decisions in the *Hughes* and *United Air Lines* cases causes any difference in the treatment given in Illinois courts to out-of-state litigation. We submit that this Court cannot create a discriminatory policy for Illinois and then hold that policy unconstitutional.

II.

REPLY TO RESPONDENT'S POINT II.

1. The instructions given do not cure the error in admitting the improper actuarial testimony.

Respondent does not attempt to sustain the holding below that the admission of the actuary's calculations, while erroneous, was not prejudicial error because the error was "counter-balanced" by other restrictive factors in the bases for the calculations. Instead, respondent argues that the jury were correctly instructed as to the proper measure of damages and hence the error was made harmless.

But the rule is well settled, in Illinois and elsewhere, that error in the admission of evidence relating to damages is not cured by correctly instructing the jury as to damages. The Illinois rule is stated in *McCormick* v. *Decker,* 193 Ill. App. 451, at 453, syllabus No. 3. A more complete statement of the basis for the rule is found in *Silver King Mining Co.* v. *Kendall,* 23 Ariz. 39, 201 Pac. 102, at 104:

> "It is further contended that the error was cured by the instructions. It is true that the court correctly instructed the jury as to the proper measure of damages when he advised it that the amount of recovery was limited to compensation; that is, to the actual loss suffered by appellee as a proximate and direct result of the accident causing the injury. The husband and father himself being the plaintiff, the loss sustained by the wife and child was not an element of damage, though in a death case, where the action is prosecuted for the benefit of the widow and children, their loss is measured by his worth to them as a husband and father would be the guide. The admission of this evidence, however, justified the jury in considering it, as well as all the other testimony in the case, in arriving at its verdict. Who can say, then, what effect the child and its need of care and an education may have had on the result? As stated by the Supreme Court of Illinois in *Pittsburgh, etc., R. Co.* v. *Powers,* 74 Ill. 341:
>
> > 'It is impossible for us to know what portion of the verdict in this case was allowed because appellee had a family. The evidence was before the jury for the purpose of enhancing the damages, and we have no doubt it produced that result.'
>
> "The error, perhaps, could have been cured by cautioning the jury in its instructions against increasing the amount of the verdict on account of the plaintiff's having a wife and child, and that he had supported them up to the time of the injury. Nowhere, however, was the jury admonished to disregard this evidence, though doubt as to its admissibility was expressed by the court at the time it was offered. The

failure to do this, however, even though the instructions were otherwise correct, is ground for a reversal of the judgment. *Galion* v. *Lauer*, above; *Kinsley* v. *Morse*, 40 Kan. 577, 20 Pac. 217; *Central Passenger Ry. Co.* v. *Kuhn*, 86 Ky. 578, 6 S.W. 441, 9 Am. St. Rep. 309; *Vosburg* v. *Putney*, 78 Wis. 84, 47 N.W. 99."

See also *Ensign* v. *Southern Pacific Co.*, 193 Cal. 311, 223 Pac. 953; *Ernshaw* v. *Roberge*, 86 N.H. 451, 170 Atl. 7; *Murdock* v. *Biery*, 269 Pa. 577, 112 Atl. 772.

2. The actuary's calculations were not made in accordance with rules stated in the instructions.

So here, the actuarial testimony was adduced by the plaintiff "for the purpose of enhancing the damages" and from the amount of the verdict, we may properly conclude "no doubt it produced that result." But the instructions to which counsel refer vitiate his whole argument. True, the jury were instructed that the pecuniary loss of the children was limited to the period of their minority, but the actuary's calculations were not so limited; those calculations projected the same amount of contributions for 464 months, or until the children would be 40 and 42 years of age. The necessary effect of the decision below is that the court approved this projection *as a matter of law* in holding there was no prejudicial error in permitting the actuary to project present assumed contributions to age 65 because he should have been permitted to make calculations for the entire life expectancy.

Again it is true that the jury were instructed to consider the decedent's contributions to his dependents, rather than gross earnings less his personal expenses, as in the *Leslie* case, 238 U.S. 599. But the figure which the actuary used as the basis for his calculations was gross earnings, less only $50 per month for personal expenses and estimated federal income tax withholdings, and the Illinois

Supreme Court specifically held the tax withholdings should not have been deducted. The rule of recovery thus approved by the decision below is gross-earnings-less-personal-expenses, the very measure condemned by the *Leslie* decision. It is immaterial that in the *Leslie* case the error presented itself in instructing the jury how they might calculate damages whereas here the error is in permitting the actuary to make the calculations for them. As the Court of Appeals pointed out in *Wetherbee* v. *Elgin, J. & E. Ry. Co.,* 191 F. 2d 302, 311, speaking of the actuary's calculations:

> "His testimony of his calculations was merely to assist the jury on the matter of computing, and he could not properly be permitted to use as the basis for his calculations, figures or elements which the jury could not use."

Respondent seeks to distinguish the *Leslie* case on the ground that the instruction given there would have allowed the jury to award both "the sum contributed to the dependents" and "whatever amount the deceased was able to save." But the actuary's calculations here included Allendorf's savings—his payments into a credit union, his insurance premiums(which we are constantly reminded are one form of savings) and his payments on his house (which is a capital investment). (Abst. 94-95) Contrary to the instructions given by the trial court which limited recovery to contributions, the Illinois Supreme Court held that the actuary's calculations properly did, or properly should have included not only these items, all of which are "savings" of one kind and another, but also the withholdings for railroad retirement and federal income taxes—neither of which is in any sense a "contribution" to his wife and children.

3. The error challenged here is in the Supreme Court's opinion, not in the Trial Court's instructions.

The *Allendorf* case will be cited—and indeed, it already has been cited in *Wawryszyn* v. *Illinois Central R. Co.*, 10 Ill. App. 2d 394, 407, 408, 135 N.E. 2d 154, at 160, 161, not for the correct principles stated in the trial court's instructions, but rather for the incorrect principles stated in the opinion that "contributions" includes savings wage deductions, tax withholdings and all gross earnings other than personal expenses; that contributions to a minor dependent may be projected not only during the years of minority, but for the entire expected lifetime of the father; and that pecuniary contributions to his widow would continue unabated after he had retired. These are the respects in which the decision below is squarely in conflict with the decisions cited at p. 8 of the petition for certiorari. It was not open to the Illinois Supreme Court to make a choice to admit proof of actuarial computations on a basis contrary to that established by this Court and the Courts of Appeal for the Sixth, Seventh and Eighth circuits. The conflict created by the decision below on the very important issue of the proper method of assessing damages in an F.E.L.A. death case can only be resolved by review by this Court.

We respectfully submit that certiorari should be granted in this case and the decision below reversed.

Respectfully submitted,

HARLAN L. HACKBERT,
Attorney for Petitioner.

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JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 182

RUTH ELAINE ALLENDORF, as Special Administratrix of the Estate of James Dale Allendorf, Deceased,
Respondent,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Petitioner.

Petition for Rehearing

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November 15, 1956

AIR MAIL

Honorable Earl Warren
Chief Justice of the United States
Supreme Court
Washington, D. C.

Re: Allendorf vs. Elgin, Joliet and
Eastern Railway Company - No. 182

My Dear Mr. Chief Justice:

Subsequent to the preparation [illegible] I was requested by one

Subsequent to the preparation [illegible] rehearing in the above entitled cause, I was requested by one of the student editors of the Harvard Law Review to furnish him with a set of the briefs and printed record in this case for consideration of the case as the subject of a comment in Harvard Law Review. Today I have received a similar request from the Law School of Yale University, with the advice that since they regard the case as "one of legal significance" it has been selected for argument in the Yale Moot Court of Appeals during the 1957 spring term.

We believe that this expression of interest evidenced so promptly after the opinion was reported supports our view, urged in the petition for rehearing, that the issues in the case are of far greater significance than the impact of the decision upon the immediate parties to the litigation. For that reason, I take the liberty of calling these facts to your attention for such consideration by the Court as you may see fit to afford them.

Yours very truly,

Harlan L. Hackbert

HLH/mt
cc: William H. Dege[illegible], Esq.
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IN THE

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Petitioner.

Petition for Rehearing

Your petitioner, Elgin, Joliet and Eastern Railway Company, respectfully petitions this court for a rehearing of the denial of its petition for certiorari on October 8, 1956. In support of such petition for rehearing your petitioner submits that the court has misapprehended or overlooked the important and far-reaching implications of the decision below (1) upon the constitutional issue of the right of a state to regulate by legislation the jurisdiction of its courts, a question which the court below decided in

a way probably not in accord with applicable decisions of this court, and (2) the substantive issue of the proper measure of damages in an action for wrongful death under the Federal Employers' Liability Act, an issue which the court below decided in a manner in conflict with decisions upon the same or related issues in other reviewing courts, and in a way probably not in accord with applicable decisions of this court. We respectfully submit that the conflict of the decision below on the constitutional question with the decision of this court in *Missouri ex rel Southern Ry. Co.* v. *Mayfield,* 340 U. S. 1, and the decisions of state courts of last resort following the *Mayfield* decision and the conflict of far-reaching practical importance between the decision of the court below on the question of the proper measure of recoverable damages and the decisions of this court, the courts of appeal for the Sixth, Seventh and Eighth Circuits, and the reviewing courts of the several states in which there are scores of decisions on the issue which arises in every litigated FELA wrongful death action, are squarely presented by this record, and in the interests of obtaining an authoritative resolving of the conflicts should be settled by a decision of this court.

The consistent trend of this court's rulings adverse to railroad defendants in FELA cases has been made the subject of scholarly research and report in a note in 69 Harvard L. Rev. 1441. Notwithstanding the appearance of even-handed treatment of these cases in Mr. Justice Douglas' "account for our stewardship in this group of cases" in his concurring opinion in *Wilkerson* v. *McCarthy,* 336 U.S. 53, at 68, the blunt fact of the matter is that from the 1938 term through the 1954 term, this court denied every petition by the railroad defendants raising the question of the submission of the case to the jury save

one, which was subsequently dismissed as improvidently granted, while 46.2% of the petitions filed by employees were granted, a percentage just double the average for the same period. Of the 36 cases which were decided by this court the judgment below in favor of the railway defendant was affirmed in only 5 cases, and in no instance did the successful defendant obtain the concurrence of more than five members of the court. During that period four justices of the court voted against the railway defendant in every case. 69 Harvard L. Rev. at 1446. During this entire period only one employer's petition for certiorari was granted, and the cause decided by this court. That was the *Mayfield* case, *supra*. The decisions at the 1955 term followed the established pattern: 7 employees' petitions out of 12 filed were allowed; in 3 the judgment for the defendant below was reversed in the order granting certiorari; one petition of 12 filed by railroad defendants was allowed. That was *Southern Pacific Co.* v. *Gileo*, 76 S. Ct. 952, and the decision of the court in that as well as the other 2 cases decided at the 1955 term by written opinion were adverse to the railroads. So far at the 1956 term, 3 employees' petitions have been granted; all defendants' petitions have been denied.

We concede that an important function of this court is to protect the constitutional rights of individuals to a trial by jury when their proof makes out a *prima facie* case, as well as their right to the protection of the Fifth Amendment and the right of freedom of assembly and free speech on religious and political issues. This court has been vigilant to protect the rights of FELA plaintiffs, of persons suspected of or charged with subversive activity, and of the militant religious sect known as Jehovah's Witnesses. But the Constitution of the United States is

more than a guarantee of individual liberties; it is a charter between the several states for the establishment of a federal government and for the division of the powers of government between the states and the federal government. The Tenth Amendment is no less important a part of the Constitution than is the Supremacy Clause. In practical application, the questions arising under the Tenth Amendment transcend in importance the questions arising under the constitutional provisions guaranteeing individual liberty for the latter issues seldom directly affect anyone other than the litigants themselves, while the questions of state power under the Tenth Amendment affect all citizens of the states. A citizen of a state has a vital interest in the maintenance of his individual constitutional rights, but collectively those citizens have an even greater interest in the protection of the rights and privileges reserved to the states by the Tenth Amendment.

The first significant question presented by this case is not whether Mrs. Allendorf is entitled to retain the judgment which she obtained in the Circuit Court of Cook County, Illinois, or whether she must try her case again in one of the two courts in which she filed timely actions to protect herself against an adverse ruling on the jurisdictional question here. The question is the power of a state to protect its courts from the burden of litigation imported from beyond its boundaries. The very real and practical interest which the state has was well set forth by Judge Robson in *Morris* v. *Pennsylvania R. Co.*, 10 Ill. App. 2d, 24 at 38, who, in speaking of the evil of the out-of-state solicitation of an FELA case and its importation into Cook County in the hope of "the larger settlement or ver-

dict that can be obtained if suit is filed here" said on page 38:

> "It has been estimated that the overall cost of operating a courtroom with a jury in Cook County is approximately $800 per day. The average time required to try a law jury case is two and one-half days. However, in actions involving substantial damages and severe injuries, trials of from one to two weeks are not uncommon. Thus not only does such out of state litigation add to the case load of our courts but the taxpayers of this state must assume the burden of paying the expenses of litigation for nonresidents. It is, therefore, clearly apparent that solicitation not only brings the legal profession into disrepute, but it also increases the burden of expense in operating our courts and is one of the principal factors creating the overwhelming backlog of negligence cases, which results in litigants waiting about four and one-half years for a trial in the Circuit and Superior Courts of Cook county.
>
> "The existence of these evils is not new. They have repeatedly been commented upon in other jurisdictions. (See State Bar Journal of California, Volume 6, No. 4, page 79. See *In re Bar Ass'n of City of New York,* 222 App. Div 580, 227 N.Y. Supp. 1.)"

The truth of Judge Robson's observation is confirmed by an inspection of the trial calendar for the assignment judge for the combined Circuit and Superior Court jury calendar in Chicago as of the day when the preparation of this petition for rehearing was commenced. That trial call of 308 cases listed 17 cases filed in 1950 or prior years, 141 cases filed in 1951, and 123 cases filed in the first months of 1952. There were but 27 cases filed in subsequent years, which for one reason or another had been advanced for earlier trial.

If the *Mayfield* case points out one of the rare "questions important to the enforcement of the Federal Employers Liability Act by the courts of the states" which

justifies the grant of certiorari at the petition of the employer, we submit that this case involves a question of similar importance. There is an irreconcilable conflict between the holding of the court in the *Mayfield* case that the *judicial* branch of a state government may adopt a rule of *forum non conveniens* which closes the court of that state to out of state FELA litigation and the decision of the court below that the *legislative* branch of the state government may not by a statute adopt a similar rule. Although the decision of this court in the *Mayfield* case, as well as in *Douglas* v. *New York, N.H. and H.R. Co.*, 279 U.S. 377 and *Ex parte Collett*, 377 U.S. 55, and the decisions in the several states following the *Mayfield* case, cited at pages 11 and 12 of the petition for certiorari, were strongly urged in our briefs below, those decisions are not mentioned or distinguished or shown to be inapplicable in the opinion of the Illinois Supreme Court. Of necessity, therefore, courts in other states which look to the decisions for a guide as to the power of a state, whether by statute or judicial decision, to refuse to entertain out of state FELA litigation are left without any guide as to the applicable rule. We submit that either the *Mayfield* case is wrong or the decision of the court below is wrong, and that in view of the extensive transportation of FELA cases from all over the country to a relatively few centers of litigation as shown by the statistics summarized at page 4 of petitioner's reply brief here, the question whether any federal policy protected by the Supremacy Clause purports "'to force a duty' upon the state courts to entertain or retain Federal Employers Liability litigation 'against an otherwise valid excuse' "—and "controlling the abuses of imported litigation" is such a "valid excuse" (see 39 Yale L. Jour. 388)—is a question which must occur again and again and which should be settled authoritatively and finally by this court. In recent years

in one aspect or another the question has been presented to this court in *Miles* v. *Illinois Central R. Co.,* 315 U.S. 698; *Ex parte Collett,* 337 U.S. 55; *Kilpatrick* v. *Texas & Pacific Ry. Co.,* 337 U.S. 75, and in the *Mayfield* case, 340 U.S. 1. The conflict between those decisions of this court and the decision below is one which should be resolved now and for all time.

If *Southern Pacific Co.* v. *Gileo,* 76 S. Ct. 952, sets the other condition upon which an employer's petition for certiorari should be granted by this court, we submit that the second question presented by this record meets that test. In the *Gileo* case, seventeen years after the the adoption of the 1939 amendment and its redefinition of "interstate commerce," this court finally granted certiorari to decide the scope and meaning of that redefinition, an issue which had been raised in scores of decisions in the federal courts of appeal and the reviewing courts of the states. Without undertaking to tabulate all of the cases, we may say that in at least four of our appeals during this period that issue was a decisive issue in the case. Finally, this court granted certiorari because the consolidated cases "involve interpretation of an important federal statute governing railroad employer obligations to its injured employees." 76 S. Ct. at 955.

The question of the measure of recoverable damages in a wrongful death action under the Federal Employers' Liability Act is one which arises in every such action whether tried in a state court or federal district court. The case reports today are replete with decisions involving one phase or another of the questions presented by this record: the use of gross earnings as against "take home pay" in determining the employee's pecuniary contributions to his dependents, the right to introduce evidence or argue to the jury or request instructions as to

the impact of federal income taxes and wage withholdings, the use of work expectancy rather than life expectancy in projecting the loss of earnings or loss of pecuniary contributions into the future, the right of an actuarial witness to testify to calculations made by him on the basis of definite amounts of earnings and precise periods of time, and finally the effect of the attainment of maturity by minor dependents. Whereas other cases often present only particular aspects of these problems, this record presents the problem in its entirety. Here again is a question constantly arising in these cases upon which there are conflicting rulings in various jurisdictions. If the decision below stands, the state courts in Cook County will apply one rule as to the admission of actuarial evidence and the scope of arguments and instructions to the jury, while the federal district courts sitting only three blocks away must follow the very different rules prescribed by the Court of Appeals for the Seventh Circuit in *Wetherbee* v. *Elgin, J. & E. Ry. Co.*, (C.A. 7) 191 F. 2d 302. We submit that if the decision below is not clearly wrong with respect to the actuarial evidence under the decisions of this and other federal appellate courts, then the question is "an important question of federal law which has not been, but should be, settled by this court."

For the foregoing reasons, and to settle the constantly recurring questions which are fully and inescapably presented by this record, we submit the order denying the petition for certiorari should be vacated, that certiorari should be granted and the cause heard, and the questions should be resolved and decided by this court.

Respectfully submitted,

HARLAN L. HACKBERT,
Attorney for Petitioner.

Certificate.

The undersigned certifies that this petition for rehearing is presented in good faith and not for delay, and that in his opinion the petition for rehearing states circumstances of substantial or controlling effect which, although previously available to petitioner, were not previously presented in their present form or, apparently, in adequate manner to disclose to the court the importance of the issues here presented.

HARLAN L. HACKBERT
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